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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1988

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MICHIGAN DEPARTMENT OF STATE POLICE and COL. R. T. DAVIS, Director of the Michigan Department of State Police,

Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,

Respondents.

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# PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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FRANK J. KELLEY
ATTORNEY GENERAL

LOUIS J. CARUSO
Solicitor General
Counsel of Record
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

THOMAS L. CASEY
Assistant Solicitor General

PATRICK J. O'BRIEN
Assistant Attorney General
Attorneys for Petitioners

## QUESTION PRESENTED

Where the Michigan courts concluded that the proposed Michigan sobriety checkpoint program addresses an issue of legitimate public concern, that it would have some effectiveness, and that objectively it would be only minimally intrusive, is the checkpoint program facially unconstitutional in violation of U.S. Const Amend IV merely because the Michigan courts also found that it would not be as effective as other law enforcement methods and that it would have a potential for generating subjective surprise and fear in some motorists?

## LIST OF PARTIES

The parties to the proceedings in the Michigan courts were the same as in this court except that Petitioner Col. R. T. Davis, Director of the Michigan Department of State Police has been automatically substituted pursuant to Supreme Court Rule 40.3 for his predecessor in office, Gerald L. Hough, the former Director.



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## OPINIONS BELOW

The opinion of the Wayne County Circuit Court is not officially reported. A copy of the opinion and order is reproduced in the Appendix beginning at page 26a.

The opinion of the Michigan Court of Appeals is reported as Sitz v Department of State Police, 170 Mich App 433, 429 NW2d 180 (1988). A copy of the opinion is reproduced in the Appendix beginning at page 2a.

The per curiam order of the Michigan Supreme Court denying leave to appeal is not officially reported. A copy of the order is reproduced in the Appendix beginning at page 1a.



## JURISDICTION

The trial court's opinion and order were entered June 24, 1986. The Michigan Court of Appeals opinion was entered August 1, 1988. A timely application for leave to appeal was filed in the Michigan Supreme Court and was denied in an order entered February 22, 1989. This Court's jurisdiction is invoked pursuant to 28 USC § 1257(a).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const, Amend IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

MCL 257.715:

"(1) Equipment on motor vehicles as required under this act shall be maintained as provided in this act. A uniformed police officer may on reasonable grounds shown stop a motor vehicle to inspect the vehicle, and if any defects in equipment are found, issue an appropriate citation under section 728 or 742 to the driver and order the driver to have the defect or defects repaired immediately. In case of an accident a police officer may make an inspection of the vehicles involved in the accident.



"(2) The director of the department of state police shall cause inspection to be made of motor vehicles operating on the public highways to detect defective equipment or other violations of law governing the use of public highways by motor vehicles, operators, and chauffeurs. For that purpose the director may establish temporary vehicle check lanes at appropriate locations throughout the state for checking for inadequacies and violations. A county, city, village, or township police department also may operate a temporary check lane within its limits with the express authorization of the director of the department of state police and under the direct supervision of a designated representative of the director."

Michigan State Police Sobriety Checkpoint Guidelines:

The text of the Guidelines is reproduced in the Appendix beginning at page 132a.

## STATEMENT OF THE CASE

The Michigan Drunk Driving Task Force was created by temporary legislation (MCL 257.625j, which expired on September 30, 1985) and was charged with the responsibility of reviewing and making recommendations relative to all aspects of the drunk driving problem in Michigan. In its final report the Task Force made 35 recommendations for combatting alcohol-related traffic accidents, one of which was the implementation of sobriety check lanes.

In his January, 1986, State of the State address, Michigan Governor James J. Blanchard instructed the Department of State Police to initiate a sobriety checkpoint pilot program. This directive was supported by the Office of Highway Safety Planning. In response to Governor Blanchard's directive, Colonel Gerald Hough, Director of the Department of

State Police, set up an advisory committee to develop guidelines for the implementation of the sobriety checkpoint pilot program pursuant to the statutory authority of MCL 257.715. The committee, which included representatives from the Petitioner Department of State Police, county sheriffs' departments, county prosecutors' offices, and the University of Michigan Transportation Research Institute, studied the sobriety checkpoint programs of other states and the state case law which had developed since this innovative police procedure was first implemented. The committee set forth its findings and recommendations in the document referred to as the Sobriety Checkpoint Guidelines, App. 132a.

The goals and objectives of the sobriety checkpoint program as stated in the Guidelines are as follows, App. 146a:



"IV. GOALS

"--Deter drunk driving, thereby reducing the death, injury, and property damage caused by alcohol- and drug-related traffic accidents.

"--Conduct checkpoints with a minimal amount of intrusion or motorist inconvenience.

"--Assure the safety of the general public as well as law enforcement officers involved.

"V. OBJECTIVES

"--Increase the perception of 'risk of apprehension' in the minds of those drivers who would operate a vehicle while under the influence of alcohol or controlled substances.

"--Ensure that the constitutionally guaranteed rights of individuals are protected.

"--Remove intoxicated drivers from the public highways."

Under the directives set forth in the Guidelines, each checkpoint operation will be selected by the Michigan Accident Location Index (MALI) computer. The MALI system

specifically pinpoints every accident based upon intersecting roadways. It considers the driver, day of the week, the time, the weather, and any circumstances involving drinking. This system identifies those counties which have a significant alcohol-related accident problem and determines which sections of roadway within the county have the greatest problem.

Once the roadways within a county are identified, Petitioner Department of State Police must review the sites to determine whether they comply with the safety and convenience criteria set forth in the Guidelines, App. 149a.

Each sobriety checkpoint is to be made public through the use of local media prior to the checkpoint operation so as to enhance the deterrent effect among potential drunk



drivers. Although the exact time and location of the sobriety checkpoint will not be made public in advance, their use is expected to receive wide publicity. The actual checkpoint operation is expected to last approximately two to four hours, depending upon the MALI-identified drunk driving period and the activity experienced.

The sobriety checkpoint is set up by placing reflectorized signs announcing in sequential order: "Sobriety Checkpoint Ahead," "Reduce Speed," "One Lane Road Ahead," and "Be Prepared to Stop." These signs are to be set in front of the checkpoint and separated by intervals of 250 to 500 feet. After the third sign, a series of orange cones will be set up to funnel traffic into one lane so that the drivers arrive at the contact point in a single line

of cars. Lighted fusees will be placed between the orange cones for additional illumination of the checkpoint lane. The area where the contact officers are located shall be totally illuminated by portable lighting equipment during evening operations. In addition, contact officers shall use reflectorized vests to increase their visibility. The opposite lane of traffic will not be checked; however, it will be slowed and funneled into one lane as an additional safety measure.

Director Hough testified that an additional criteria not set forth in the Guidelines is that the site selected must afford the driver the opportunity to make a legal and safe U-turn.

The essential aspects of the checkpoint operation are described as follows, App. 161a:



"Officers will be assembled in the roadway to check motorists for articulable signs of intoxication. These officers will wear department-issued reflectorized vests and utilize orange cones attached to their flashlights for traffic direction and control.

"All traffic entering the checkpoint will be stopped. A uniformed police officer will approach the motorist and state, 'I am Trooper (Officer) _____ of the Michigan State Police (local police department). You have entered a sobriety checkpoint set up to identify intoxicated drivers.' If there is no immediate evidence of intoxication, a traffic safety informational brochure and survey card will be given to the motorist.

"During the brief stop, the officer will look for articulable signs of intoxication such as an odor of alcohol about the driver, slurred speech, and other behavior normally associated with OUIL or OUID violators. If the officer observes symptoms of intoxication, the driver will be directed to a predetermined 'safe area' for further investigation. If the situation warrants, the driver will be asked to submit to a preliminary breath test; and if sufficient evidence of intoxication is observed, the driver will be arrested."

Maryland performed a public survey during its sobriety checkpoint operation which was

implemented on December 17, 1982, during National Drinking and Driving Awareness Week. The Maryland survey found that 97% of the motorists were not significantly delayed in their journey, over 90% of the motorists believed that sobriety checkpoints will deter people from driving while intoxicated, 90% believed sobriety checkpoints would increase a drunk driver's risk of being detected and arrested, and 87% of the motorists who responded approved of using sobriety checkpoints to detect and deter drunk drivers. Michigan has utilized the Maryland sobriety checkpoint as its model in setting up its own program.

This first sobriety checkpoint operation conducted by Petitioner Department of State Police on May 17, 1986, was a successful operation. Despite the fact this checkpoint



was closed down after less than one hour of operation due to inclement weather, the checkpoint was able to accommodate 126 vehicles with an average time of delay to the motorists of 25 seconds or less. Acceptance by the people going through the checkpoint was favorable as evidenced by the fact that none of the drivers appeared ill at ease and everyone cooperated with the officers. The checking of these 126 drivers resulted in the detaining of two drivers for sobriety field tests and the arrest of one driver for driving while under the influence of alcohol. Another driver ran through the sobriety checkpoint and was subsequently stopped by the officer in the observation vehicle and arrested for driving while under the influence of alcohol. There were no accidents, injuries, or altercations reported. This operation resulted in

extensive media coverage as expected and encouraged by the law enforcement agencies involved.

Respondents filed a Complaint in the Wayne County Circuit Court on May 16, 1986, alleging that the checkpoints violated both the United States Constitution and the Michigan Constitution and requesting a preliminary injunction against the use of sobriety checkpoints. Petitioners stipulated that no further sobriety checkpoints would be conducted pending the outcome of the litigation.

The trial court held an evidentiary hearing and then issued an opinion and order (App. 26a) holding the checkpoint procedure unconstitutional. The Michigan Court of Appeals affirmed (App. 2a) and the Michigan Supreme Court denied leave to appeal



(App. 1a). The state courts applied a balancing test pursuant to Brown v Texas, 443 US 47 (1979) and purported to weigh the gravity of the public concerns served by the checkpoints, the degree to which they advanced the public interest, and the severity of their interference with individual liberty. The courts concluded that there was an undisputed serious and legitimate public interest in curbing drunk driving (App. 13a, 72a-74a); that the checkpoints had some effectiveness in apprehending drunk drivers (App. 14a-20a, 123a); and that objectively the intrusion on individual liberties caused by the checkpoints was minimal (App. 21a, 103a). The state courts found the checkpoint procedures to be unconstitutional, however, because they concluded that, although there was a short-term deterrent effect on drunk

driving, there was no long-term deterrence (App. 92a, 14a-15a); because they felt that other law enforcement methods would be more effective (App. 19a-20a, 95a-101a); and because they believed that subjectively the checkpoints had the potential to generate surprise or fright in some motorists (App. 21a-22a, 104-110a).



## REASONS FOR GRANTING THE WRIT

### The Constitutionality Of Traffic Sobriety Checkpoints Presents An Important Question Of Federal Law As To Which The State Courts Are In Conflict And Which Should Be Decided By This Court.

This case involves a facial Fourth Amendment challenge to a police procedure for limited stops of all automobiles passing through fixed traffic checkpoints established at predetermined locations for limited duration in order to apprehend drivers under the influence of alcohol or drugs and to deter others from drinking and driving. This Court has not yet ruled explicitly on the constitutionality of such procedures, although it has discussed applicable principles in the contexts of random automobile seizures, Delaware v Prouse, 440 US 648 (1979), United States v Brignoni-Ponce, 422 US 873 (1975), Brown v

Texas, 443 US 47 (1979), fixed border checkpoints seizures, United States v Martinez-Fuerte, 428 US 543 (1976), and in the recent drug testing cases, Skinner v Railway Labor Executives Association, ___ US ___, 57 USLW 4324 (1989), National Treasury Employees Union v VonRaab, ____ US ____, 57 USLW 4338 (1989).

The Michigan traffic checkpoint procedures were developed after carefully studying similar programs in other states, and the procedures were carefully designed to overcome infirmities which had invalidated some such programs. The ruling of the Michigan courts in the instant case purports to be a comprehensive Fourth Amendment analysis of traffic sobriety checkpoint procedures and the decision of unconstitutionality here is clearly in



conflict with the decisions of other state courts of last resort which have found traffic sobriety checkpoint procedures to be constitutional, particularly In re Richard T., 185 Cal App 3d 855 (1986), cert den Richard T. v California, ___ US ___ (1988). A listing of states which have considered the constitutionality of sobriety checkpoints is contained at App. 165a-168a.

Given the magnitude of the problem of drinking and driving in this country, the number of states which have attempted to address the problem by implementing sobriety checkpoints and the conflicting results of those efforts, and the importance of obtaining nationwide uniformity as to the constitutionality under the Fourth Amendment of such procedures, Petitioners submit that the issue in this case is sufficiently

important and that there is sufficient conflict between the states to warrant review by this Court.

The Constitutional Standard

It is undisputed that the limited stops of automobiles at the Michigan traffic sobriety checkpoints constitute seizures implicating Fourth Amendment rights. United States v Martinez-Fuerte, supra, 428 US at 556. See also Brower v County of Inyo, ___ US ___, 57 USLW 4321, 4322 (1989) (a Fourth Amendment seizure occurs "only when there is a governmental termination of freedom of movement through means intentionally applied"). The governing principles after the Fourth Amendment has been found applicable were recently summarized in Skinner v Railway Labor Executives Association, supra, 57 USLW at 4328:



"To hold that the Fourth Amendment is applicable to the drug and alcohol testing prescribed by the FRA regulations is only to begin the inquiry into the standards governing such intrusions. *** For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. *** What is reasonable, of course, 'depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself.' *** Thus, the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interest.'" (Citations omitted).

Automobiles have traditionally been treated differently than homes for Fourth Amendment purposes, because of the inherent mobility of automobiles and because "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." South Dakota v Opperman, 428 US 364, 367 (1976) (footnote omitted). In Opperman this Court noted that the expectation of privacy with

respect to automobiles "is further diminished by the obviously public nature of automobile travel" and also noted that automobiles are subjected to "pervasive and continuing governmental regulation and controls" and that as part of their responsibility for ensuring public safety, law enforcement officials are brought into frequent contact with automobiles including circumstances where police stop and examine vehicles "as an everyday occurrence". 428 US at 368.

The Court has had frequent opportunity to discuss Fourth Amendment principles applied to automobile seizures in the context of border searches, both by roving patrols and at fixed checkpoints. In United States v Brignoni-Ponce, 422 US 873 (1975), the Court considered a case in which two officers were parked by the side of the highway using their



headlights to illuminate passing cars so that they could view the occupants and determine if any appeared to be of Mexican descent. The Court held that the Fourth Amendment prohibits the use of roving patrols to search vehicles without a warrant or probable cause at points removed from the border. In United States v Martinez-Fuerte, 428 US 543 (1976), however, the Court considered whether the Fourth Amendment is violated where a vehicle is stopped at a fixed checkpoint for brief questioning of its occupants, even though there was no reason to believe the particular vehicle contained illegal aliens. The Court concluded that such checkpoint stops are seizures within the meaning of the Fourth Amendment, but also concluded that under the circumstances, the intrusion was minimal and the governmental interests outweighed the privacy interests and therefore such seizures are constitutional.

In Delaware v Prouse, 440 US 648 (1979), the Court reviewed Brignoni-Ponce, supra, and Martinez-Fuerte, supra, in a case where a patrolman randomly stopped a vehicle to check the driver's license and car registration even though he had not observed a traffic or equipment violation or any suspicious activity. Although the Court held that random discretionary stops by police officers require articulable and reasonable suspicion, the Court went on to say, 440 US at 663:

> "This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at road block-type stops is one possible alternative."
> (Footnote omitted).

This statement is similar to language in Martinez-Fuerte, supra, 428 US at 560, fn 14, where the Court noted that the use of



checkpoints for automobile seizures is commonplace:

> "Stops for questioning, not dissimilar from those involved here, are used widely at state and local levels to enforce laws regarding driver's licenses, safety requirements, weight limits, and similar matters. The fact that the purpose of such laws is said to be administrative is of limited relevance in weighing their intrusiveness on one's right to travel; and the logic of the defendant's position, if realistically pursued, might prevent enforcement officials from stopping motorists for questioning on these matters in the absence of reasonable suspicion that a law was being violated. As such laws are not before us, we intimate no view respecting them other than to note that this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use."

In Brown v Texas, 443 US 47 (1979), where a random stop-and-identify statute was held unconstitutional, the Court observed that a "central concern" in assessing the reasonableness of a traffic stopping scheme is

"that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." 443 US at 51. To this end, Brown requires that a seizure be based upon specific objective facts or "that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." 443 US at 51. The Court identified factors to be used in evaluating the constitutionality of such seizures, 443 US at 50-51:

> "The reasonableness of seizures that are less intrusive than a traditional arrest ... depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' *** Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest and the severity of the interference with individual liberty." (Citations omitted).



In the instant case, the Michigan courts purported to apply the Brown factors, but Petitioners submit that the state courts distorted the analysis by giving undue consideration to their view of the effectiveness of the checkpoint procedures, particularly in applying a less-restrictive-alternative analysis in comparison to other police procedures and by relying on pure speculation with respect to the supposed subjective intrusiveness of the checkpoint procedures. The state courts' finding of unconstitutionality thus is in conflict with applicable principles in other decisions of this Court.

Threshold Level of Effectiveness

A principal basis for the Michigan courts' decision was that although they

agreed that the checkpoints were somewhat effective, they felt that the procedures were not effective enough. This conclusion is clearly contrary to principles enunciated by this Court. As shown by the single checkpoint procedure which was implemented in Michigan, as well as by the statistics in other reported cases, traffic sobriety checkpoints result in the apprehension of persons charged with drunk driving in approximately 1% of the vehicles which go through the checkpoints. App. 79a-82a. In addition, the state courts acknowledged evidence in this record which indicated at least short-term deterrent effects from such checkpoints, although the long-term deterrent effects were questionable. App. 14a-20a, 92a, 123a.

Petitioners submit that where, as here, the nature of the public interest is very



substantial and the intrusiveness of the seizure is minimal, the constitutionality of the seizure can be sustained without requiring a showing of the heightened level of effectiveness mandated by the state courts. This Court's cases support this interpretation, as shown most recently in National Treasury Employees Union v VonRaab, supra, 57 USLW at 4343, where it was contended, among other things, that a drug testing program was unjustified and therefore unreasonable because no more than five employees out of 3,600 tested positive for drugs. The Court evaluated this contention in light of the safety and security hazards which the program addressed and categorically rejected the challenge, 57 USLW at 4343:

> "The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity. The same is likely to be true of householders who are required to submit to suspicionless

housing code inspections, see Camara v Municipal Court, 382 US 523 (1967), and of motorists who are stopped at the checkpoints we approved in United States v Martinez-Fuerte, 428 US 543 (1976). *** Where, as here, the possible harm against which the government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the government's goal." (Footnote omitted).

In the footnote to the foregoing quotation, the Court analogized to the required search of all passengers seeking to board commercial airliners as well as the search of their carry-on luggage and observed, 57 USLW at 4343, fn 3:

> "When the government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success."

The gravity of the public concern which is at issue in the instant case is undisputed.



This Court has made reference to it in South Dakota v Neville, 459 US 553, 558 (1983), in the course of holding that the admission into evidence of refusal to take a blood-alcohol test did not violate constitutional rights:

> "The situation underlying this case--that of the drunk driver--occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here."

In Railway Labor Executives Association, supra, 57 USLW 4324, this Court approved a program of breath, urine and blood testing for drugs and alcohol which constituted searches far more intrusive than the limited seizures at issue in this case. Individualized suspicion was not required because the "important government interest furthered by the intrusion" outweighed the "minimal" privacy interest at stake,

particularly in an area which is "regulated pervasively to ensure safety." 57 USLW at 4330.

> "This governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty. This interest also 'require[s] and justif[ies] the exercise of supervision to assure that the restrictions are in fact observed.'"
> 57 USLW at 4329. (Citation omitted).

In Railway Labor Executives Association, supra, the testing program was based in large part on the fact that in the nine-year period from 1972 to 1983 nationwide statistics showed there were at least 21 significant train accidents involving drug or alcohol use which resulted in 25 fatalities, 61 non-fatal injuries and property damage of $19 million, 57 USLW at 4325. In the instant case, by comparison, the advisory committee which



developed the guidelines for the Michigan sobriety checkpoint program cited the following statistics, App. 140a:

> "Michigan 1984 alcohol-related traffic crash statistics reveal that 800 persons died, 28,681 suffered personal injury, with a total economic cost of $351,959,000."

In National Treasury Employees Union, supra, the positive drug testing rate was slightly more than one-tenth of one per cent. That is virtually the same as the percentage of vehicles found to contain deportable aliens at the checkpoint in Martinez-Fuerte, 428 US at 554 (171 vehicles out of 146,000). The airport searches discussed in footnote 3 of National Treasury Employees Union found only 42,000 firearms out of approximately 19.5 billion searches of persons and pieces of luggage (0.0002%). Those statistics should be compared to the success rate of sobriety checkpoints which approximates 1%.

The success rate of apprehending drunk drivers must also be evaluated in light of the fact that the features of the program which reduce its effectiveness--such as advance publicity, limited operation, and the opportunity to avoid the checkpoint entirely--are the same factors which reduce the intrusiveness of the seizure itself. The irony of this was noted in National Treasury Employees Union v VonRaab, supra, 57 USLW at 4344, fn 4.

Less-Restrictive-Alternative Analysis Improper

To the extent that the state courts evaluated the effectiveness of the sobriety checkpoint procedure in comparison to other police procedures, its decision clearly violates the principle that such less-restrictive-alternative arguments are



inapplicable in the search and seizure context. In United States v Martinez-Fuerte, 428 US at 556, fn 12, the Court specifically rejected such an argument:

> "The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search and seizure powers."

The inapplicability of this type of analysis was recently reaffirmed in Railway Labor Executives Association, supra, 57 USLW at 4331, fn 9, where the Court again rejected such an argument:

> "We have repeatedly stated, however, that '[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means.' *** It is obvious that '[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers,' ... because judges engaged in post hoc evaluations of government conduct 'can almost always imagine some alternative means by which the objectives of the [Government] might

have been accomplished.'"
(Citations omitted).

Railway Labor Executives Association also observed that in a facial constitutional challenge such as the instant case, the question is "whether the tests contemplated by the regulations can ever be conducted", 57 USLW at 4332 (emphasis in original).

Checkpoints Are Only Minimally Intrusive

Despite concluding that the sobriety checkpoints resulted in only minimal objective intrusion, the state courts also erred in giving determinative weight to their own perception of the potential subjective nature of the intrusion. The state courts held that even though the nature and duration of the seizure were objectively reasonable, the checkpoints were unconstitutional because



of the potential that someone might experience surprise or fear. Such a conclusion is without factual support in this record, gives improper weight to this factor of the analysis, and is directly contrary to conclusions of this Court that checkpoint stops are not subjectively intrusive.

This Court has had several occasions to evaluate the intrusiveness of various types of traffic stops. In United States v Brignoni-Ponce, supra, the Court held unconstitutional the practice of roving patrols. In United States v Ortiz, 422 US 891, 894-895 (1975), however, the Court observed that the seizures at traffic checkpoints are "far less intrusive" than those at roving patrol stops:

"At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officer's authority, and he is much less likely to be frightened or annoyed by the intrusion."

Similarly in United States v Martinez-Fuerte, supra, 428 US at 558-559, the Court reiterated that the subjective intrusion at checkpoint stops is "appreciably less" than the intrusion caused by roving patrols:

> "Routine checkpoint stops do not intrude similarly upon the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for



> abusive or harrassing stops of individuals than there was in the case of roving-patrol stops. Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial reivew." (Footnote omitted).

See also Delaware v Prouse, supra, 440 US at 657.

The only difference between the sobriety checkpoints at issue in the instant case and the checkpoints at issue in Martinez-Fuerte is that Michigan's sobriety checkpoints are not operated at permanent locations and their exact locations are not publicized in advance. Unlike a roving patrol, however, while a sobriety checkpoint is in operation its location is fixed, the duration of its operation is limited to a few hours, and the duration of each seizure is limited to a few seconds. Similarly, the existence of checkpoints in a general area is publicized

in advance and each checkpoint is operated in such a manner, by way of advance signs, lights, and fusees, for example, that its location cannot be deemed a surprise to a motorist. In sum, the operation of the Michigan sobriety checkpoints is, for constitutional purposes, virtually identical to the checkpoints at issue in Martinez-Fuerte and is unlike the roving patrols at issue in Prouse. The Michigan courts' decision to the contrary is unsupported by any evidence in this record and is contrary to the principles enunciated in Ortiz, Martinez-Fuerte, and Prouse.



**The State Courts' Reference To The Michigan Constitution Does Not Constitute An Adequate And Independent State Ground Precluding Review By This Court.**

In Michigan v Long, 463 US 1032, 1040-1041 (1983), this Court said that when a state court decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion" the Court will assume that the state court believed that federal law required the decision. A "plain statement" to the contrary would preclude review by this Court, 463 US at 1041:

> "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."

In the instant case the trial court concluded that the Michigan Constitution

provided greater protection than the Fourth Amendment to the U.S. Constitution and cited Michigan v Long while purporting to establish an adequate and independent state law ground for its decision invalidating the sobriety checkpoint procedure. App. 130a-131a and fn 18. Petitioners submit that this conclusion is clearly wrong as a matter of state law since the Michigan Constitution does not provide greater protections, see People v Smith, 420 Mich 1, 18-20, 26-28 (1984) and People v Chapman, 425 Mich 245, 252-253 (1986), but in any event the question is irrelevant here, since the Michigan Court of Appeals explicitly chose not to consider the issue whether the Michigan Constitution provides greater protections. The Court of Appeals affirmed the judgment that the Michigan Constitution was violated by the checkpoint procedures, but only because the



Michigan Constitution "offers at least the same protection as accorded by the Foruth Amendment and we have already found the checkpoint program to be an unreasonable seizure under the Fourth Amendment." Sitz v Department of State Police, supra, 170 Mich App at 445; App. 24a.

Ironically, this language pertaining to the state constitution is almost identical to language used by the state court and discussed in Delaware v Prouse, 440 US 648, 652 fn 4, 651-653 (1979). This Court concluded that the reference to the state constitution did not constitute an adequate and independent state ground since "the state constitutional holding depended upon the state court's view of the reach of the Fourth and Fourteenth Amendments." 440 US at 653. The same result should obtain here.

In the instant case, just as in Michigan v Long, 463 US at 1043-1044:

> " ... the court below relied exclusively on its understanding of ... federal cases. Not a single state case was cited to support the state court's holding that the search ... was unconstitutional.
>
> "*** The references to the State Constitution in no way indicate that the decision below rested on grounds in any way independent from the state court's interpretation of federal law. Even if we accept that the Michigan Constitution has been interpreted to provide independent protection for certain rights also secured under the Fourth Amendment, it fairly appears in this case that the Michigan Supreme Court rested its decision primarily on federal law.
>
> "*** It appears to us that the state court 'felt compelled by what it understood to be federal constitutional considerations to construe ... its own law in the manner it did.'"
> (Emphasis in original, citations and footnotes omitted).

The reference to the Michigan Constitution in the state court opinions does not constitute an adequate and independent state ground precluding review by this Court.



## PRAYER FOR RELIEF

It is undisputed that there is a grave and legitimate public interest in curbing drunk driving. The Michigan sobriety checkpoint procedure has some effectiveness in addressing this problem and the operations of the checkpoints results in only minimal intrusiveness to the motoring public. Thus, despite the fact that the sobriety checklanes may not be the most effective police procedure available to fight drunk driving and despite the fact that there may be some potential for generating fear or surprise in some motorists, the sobriety checkpoint procedures do not violate the Fourth Amendment.

WHEREFORE, this Court should grant certiorari to review the judgment of the Michigan Court of Appeals and should hold

that the Michigan sobriety checkpoint program is consistent with the Fourth Amendment to the United States Constitution.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Louis J. Caruso
Solicitor General
Counsel of Record
752 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

Thomas L. Casey
Assistant Solicitor General
Patrick J. O'Brien
Assistant Attorney General

## APPENDIX

## APPENDIX

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Michigan Supreme Court
Lansing, Michigan

ORDER

Entered: February 22, 1989

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,

Plaintiffs-Appellees,

v

MICHIGAN DEPARTMENT OF STATE POLICE and DIRECTOR OF THE MICHIGAN DEPARTMENT OF STATE POLICE,

Defendants-Appellants.

SC: 83992
COA: 93828
LC: 86-613063-NZ

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On order of the Court, the application for leave to appeal, the motion for leave to appear as amicus curiae and the motion for an extension of time in which to answer the application are considered. The motion for leave to appear as amicus curiae is GRANTED. The motion for an extension of time in which to answer the application is also GRANTED. The application for leave to appeal is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Riley, C.J., and Boyle, J., would grant leave to appeal.

(SEAL)

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 22, 1989 /s/ Jacqueline B. MacKinnon
Deputy Clerk

STATE OF MICHIGAN

COURT OF APPEALS

---

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,

Plaintiffs-Appellees,

v

MICHIGAN DEPARTMENT OF STATE POLICE and GERALD L. HOUGH, Director of the Michigan Department of State Police,

Defendants-Appellants.

---

AUGUST 1, 1988

No. 93823

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Before: Gribbs, P.J., and Holbrook, Jr., and N.J. Lambros,* JJ.

N.J. LAMBROS, J.

This case presents the question of the constitutionality of sobriety checkpoints. Although this issue has been addressed by the courts of over one-half of the states in this country, the Michigan appellate courts have not before now had



occasion to consider this important issue.[1] In a comprehensive 60-page opinion following a bench trial of this case, Wayne Circuit Court Judge Michael L. Stacey concluded that the defendants' sobriety checkpoint plan violated both the Fourth Amendment of the US Constitution and art 1, 11 of the Michigan Constitution. The court accordingly entered an order permanently enjoining defendants from implementing their plan to conduct sobriety checkpoints along state highways. We affirm.

I

1982 PA 310 established the Michigan Drunk Driving Task Force in the Department of State Police, MCL 257.625j; MSA 9.9325(10). The Task Force was charged with reviewing all aspects of the drunk driving problem in the state. In September 1985, the Task Force

submitted its final report which set forth thirty-five recommendations for combating alcohol-related traffic accidents. One suggestion was the implementation of sobriety checkpoints on public highways. Due to legislative opposition, defendants did not attempt to implement sobriety checkpoints at that time.

In his State of the State Address on January 29, 1986, Governor Blanchard directed defendants to implement a sobriety checkpoint pilot program. In February 1986, defendant Gerald L. Hough, Director of the Michigan Department of State Police, appointed a Sobriety Checkpoint Advisory Committee, composed of representatives of the State Police, local law enforcement officials, prosecuting attorneys, and the University of Michigan Transportation Research Institute. The committee drafted guidelines for the program.



The guidelines set forth procedures as to site selection, publicity, and operation of the checkpoint, including briefing, scheduling, safety considerations, motorist contact, staffing and assignment of duties.

Under the program, checkpoints would be established at certain sites along state highways. All motorists would be stopped upon reaching a checkpoint and would be examined for signs of intoxication. Should the examining officer find indications of intoxication, the officer would direct the driver to an out-of-traffic location, check the driver's license and car registration, and possibly conduct further sobriety tests, including a breathalyzer test. If the officer concluded that the driver was intoxicated, the officer would have discretion to arrest the driver; should the officer conclude the driver was not intoxicated, the

driver was to be released.

The first sobriety checkpoint operation was conducted at Dixie Highway and Gretchen Road in Saginaw County on May 17 and 18, 1986. The Saginaw County Sheriff's Department cooperated in the operation which lasted from about 11:45 p.m. to 1:00 a.m. One hundred twenty-six vehicles passed through the checkpoint in that time, with an average delay to motorists of twenty-five seconds or less. Two drivers were retained for sobriety field tests; one was arrested for driving while under the influence of alcohol. A third driver drove through the checkpoint without stopping, was pulled over by an officer in an observation vehicle, and was arrested for driving under the influence.

This action was commenced on May 16, 1986, with the filing of plaintiffs' complaint for a declaratory judgment and



injunctive relief. Plaintiffs are licensed drivers of the state of Michigan who regularly travel throughout the state in their automobiles. During the course of the initial proceedings, defendants agreed to delay implementation of the sobriety checkpoint program pending resolution of the case.

Trial took place from May 29, 1986 through June 3, 1986. In its opinion dated June 24, 1986, the trial court found that although there was statutory authority for the operation of the sobriety checkpoints, the plan violated the Fourth Amendment of the United States Constitution and art 1, 11 of the Michigan Constitution. Defendants challenge both these findings on appeal.

II

The Fourth Amendment to the United States Constitution provides in pertinent part:

> "The right of the people to be secure in their persons ... and effects, against unreasonable searches and seizures, shall not be violated."

The United States Supreme Court has distinguished the high expectation of privacy an individual has in a home from the lesser privacy interest in an automobile. South Dakota v Opperman, 428 US 364; 96 S Ct 3092; 49 L Ed 2d 1000 (1975). As a result, the Fourth Amendment does not afford the same level of protection against warrantless searches and seizures of automobiles as of a residence. Chambers v Maroney, 399 US 42; 90 S Ct 1975; 26 L Ed 2d 419 (1970), reh den 400 US 856; 91 S Ct 23; 27 L Ed 2d 94 (1970). Nonetheless, stopping a vehicle and detaining its occupants is a seizure within the meaning of the Fourth Amendment. Delaware v Prouse, 440 US 648, 653; 99 S Ct 1391; 59 L Ed 2d 660 (1979).



The Supreme Court first considered the use of road blocks for investigatory stops in two border patrol cases. In United States v Brignoni-Ponce, 422 US 873; 95 S Ct 2574; 45 L Ed 2d 607 (1975), two officers on roving patrol stopped a vehicle to determine whether it was transporting illegal aliens. The officers admitted they had no reason to suspect the car was being used for illegal purposes. The Court held that while probable cause is not required for such a stop, the Border Patrol could not arbitrarily stop automobiles without some grounds:

> "Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrants suspicion the vehicles contain aliens who may be illegally in the country." United States v Brignoni-Ponce, supra, 422 US 884.

In reaching its decision, the Court weighed the state's interest in preventing

illegal immigration and the effectiveness of such stops in combating the problem against a brief delay and minimal intrusion imposed on motorists.

In United States v Martinez-Fuerte, 428 US 543; 96 S Ct 3074; 49 L Ed 2d 1116 (1976), the Court held that permanent checkpoints on major highways near the Mexican border were constitutional. Such checkpoints stopped all vehicles and the occupants were questioned briefly in an effort to apprehend illegal aliens. Though still a seizure, the Court concluded that the governmental interest in stemming illegal immigration outweighed the minimal intrusion made on motorists. United States v Martinez-Fuerte, supra, 428 US 564. The Court again reviewed the Public interest served, whether the procedure was an effective approach to the problem, and the objective and subjective



intrusion on an individual's privacy interest.

In Brown v Texas, 443 US 47, 50-51; 99 S Ct 2637; 61 L Ed 2d 357 (1979), the Supreme Court synthesized the factors to be considered in determining the constitutionality of seizures less intrusive than traditional arrests:

> "Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."

III

The trial court employed the Brown test, balancing the state's interest in preventing accidents caused by drunk drivers, the effectiveness of sobriety checkpoints in achieving that goal, and the level of intrusion on an individual's privacy caused

by the checkpoints. The parties to this appeal agree, as do we, that the Brown three-prong balancing test was the correct test to be used to determine the constitutionality of the sobriety checkpoint plan. Applying the Brown test to the evidence presented, the trial court concluded that although there is a grave and legitimate state interest in curbing drunk driving, the sobriety checkpoint program did not significantly further the public interest in curbing drunk driving and subjectively intruded on individual liberties. It is the latter two findings that defendants claim are erroneous.

In reviewing the trial court's findings, we are mindful that the findings of fact by the trial court are not to be set aside unless they are clearly erroneous. MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support



it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been committed. Tuttle v Dep't of State Highways, 397 Mich 44, 46; 243 NW2d 244 (1976). Due regard shall be given to the special opportunity of the trial court to judge the credibility of the trial witnesses.

A

The gravity of the drunk driving problem in the state of Michigan is undeniable. The evidence presented at trial indicated that alcohol was a contributing factor in somewhere between twenty-five percent and fifty percent of motor vehicle fatalities. It is undisputed that the state has a serious and legitimate interest in curbing drunk driving.

B

In concluding that sobriety checkpoints were not an effective means of combating drunk driving, the trial court found: (1) the degree to which a sobriety checkpoint program would deter drunk driving was directly related to the program's success in achieving actual arrests; (2) sobriety checkpoints were not an effective means of actually apprehending drunk drivers; and (3) the statistical data and testimony presented at trial demonstrated, at most, a short-term deterrent impact of sobriety checkpoint programs. We are convinced from our review of the evidence presented at trial that the trial court's findings were not clearly erroneous.

Specifically, the trial court's finding of a causal relationship between a program's success in achieving actual arrests and deterrence was supported by the testimony



of plaintiffs' expert witness, Dr. Lawrence Ross, who has extensively researched issues relating to drinking and driving. Ross testified that available data indicated that one percent or fewer of the drivers passing through sobriety checkpoints are arrested for drunk driving. He further indicated that while studies indicated a short-term deterrent effect resulting from various campaigns against drunk driving, the statistics eventually returned to their normal level. Ross' explanation for this phenomenon was that while the publicity which accompanies the initiation of such programs leads the public to believe that the chances of being caught are high, once people learn that the chances of apprehension are not that high, people return to their normal behavior.

Addi ionally, defendants' own evidence strongly supports the finding of a

causal relationship between actual arrests and deterrence value. Part II of the Sobriety Checkpoint Program Guidelines states in pertinent part:

> "Therefore, if drunk driving is to be reduced significantly through law enforcement efforts, motorists must be persuaded that if they drive while intoxicated, there is a strong likelihood they will be arrested and face the ensuing consequences. Authorities agree that many drunk drivers persist in their behavior because of a perceived low risk of arrest."
>
> Similarly, the first objective listed in part V of the guidelines is to "[i]ncrease the perception of 'risk of apprehension' in the minds of those drivers who would operate a vehicle while under the influence of alcohol or controlled substances."

Finally, we note that the ability of a particular law enforcement technique to effectuate actual arrests was deemed a relevant factor by the United States Supreme Court in its analyses in United States v Martinez-Fuerte, supra, p 554, and Delaware v



Prouse, supra, p 660. Based on our review of the record, the trial court's conclusion that the deterrent effect of the program would decline with the public's learning that the program was not, in fact, an effective tool for arresting drunk drivers, was not clearly erroneous.

Secondly, the court's finding that checkpoint programs were not an effective means for achieving actual arrests is supported by uncontroverted evidence. Dr. Ross' testimony regarding the low actual arrest rate of checkpoint programs was corroborated by the testimony of one of defendants' witnesses, Lieutenant Raymond Cotten of the Maryland State Police. The Michigan program was modeled after the Maryland program. Colonel Hough testified to his understanding that other states which had tried checkpoint programs were not achieving high rates of

actual arrests from the programs. The trial court additionally noted that the figures reported in appellate decisions of other states reflect the fact that checkpoint program yield very low drunk driving arrest rates. The court's finding that checkpoint programs are not an effective means for achieving actual arrests is not clearly erroneous.

The trial court carefully examined the evidence presented as to the deterrent effect of sobriety checkpoints. While Dr. Ross acknowledged the potential for a short-term deterrent effect of a program supported by adequate publicity, he testified that he knew of no credible studies demonstrating that sobriety checkpoints were an effective technique for long-term deterrence of alcohol-related fatalities. Colonel Hough acknowledged that he had not seen empirical



evidence showing a strong deterrent effect. Lieutenant Cotten admitted, as well, that he was unable to opine that checkpoints had a statistically significant deterrent effect. In fact, Maryland had conducted a study comparing traffic statistics between a county using checkpoints and a control county. The results of the study showed that alcohol-related accidents in the checkpoint county decreased by ten percent, whereas the control county saw an eleven percent decrease. And while fatal accidents in the control county fell from sixteen to three, fatal accidents in the checkpoint county actually doubled from the prior year.

The trial court also appropriately considered evidence presented on alternatives to checkpoints. In examining the extent to which the challenged seizure advances the public interest sought to be served, courts

should examine the availability of alternative procedures which can be more properly used. Delaware v Prouse, supra, p 655. The then-sheriffs of Macomb County, Kalamazoo County, and Wayne County all testified as to other means used in their counties to combat drunk driving and as to their respective opinions that other methods currently in use, e.g., patrol cars, were more effective means of combating drunk driving and utilizing law enforcement resources than sobriety checkpoints. Once again, based on our review of the record, we do not believe the trial court clearly erred in finding that sobriety checkpoints were not an effective means of combating drunk driving.

C

Following the Brown analysis, the trial court finally examined both the objec-



tive and subjective nature of the intrusion caused by sobriety checkpoints. Although the court found the objective intrusion, measured by the duration of the seizure and intensity of the investigation, to be minimal, the court found the subjective intrusion on individual liberty interests to be substantial.

In considering the degree of subjective intrusion, the court reviewed two factors as set forth in United States v Martinez-Fuerte, supra, p 558, (1) the potential of the checkpoints to generate fear and surprise to motorists, and (2) the degree of discretion left to individual officers. While the court found that the guidelines established to implement the checkpoints minimized on-the-scene officers' discretion, the court concluded that the checkpoints had the potential to generate fear and surprise to motorists. The court was unpersuaded by

defendants' contention that the level of surprise was minimized because motorists would be able to turn around prior to entering a checkpoint where the evidence showed the absence of any provision to alert the public to the option of turning around to avoid a checkpoint and the further absence of a provision ensuring that the checkpoints would be located where motorists could safely and legally make U-turns or turn-offs. The trial court did not clearly err in finding the potential for an unreasonable subjective intrusion on individual liberty interests.

D

The record discloses no basis for disturbing the trial court's factual findings. Moreover, such findings were made in the context of an examination under the legal standard adopted by the United States



Supreme Court for determining the constitutionality of seizures less intrusive than traditional arrests. In finding defendants' sobriety checkpoint plan to be violative of the Fourth Amendment of the United States Constitution, we fully recognize the genuine and serious drunk driving problem in Michigan and our state's interest in implementing methods designed to curb drunk driving. It is the duty of our courts to ensure, however, that governmental activities undertaken to promote the public interest satisfy constitutional standards. While the goals of the sobriety checkpoint program are laudable, the program fails to qualify as a reasonable seizure under the Fourth Amendment. Accordingly, we affirm the trial court's order enjoining defendants from implementing the program.

IV

The trial court also found defendant's sobriety checkpoint program violative of art 1, 11 of the Michigan Constitution. Defendants contend that the court, in making its finding, concluded that art 1, 11 offers greater protection than the Fourth Amendment of the federal constitution and that such a construction of the state constitutional provision is erroneous.

We find it unnecessary to consider this issue because art 1, 11 offers at least the same protection as accorded by the Fourth Amendment and we have already found the checkpoint program to be an unreasonable seizure under the Fourth Amendment. Therefore, we affirm the trial court's finding that defendants' sobriety checkpoint program is an unreasonable seizure under



art 1, 11 of the Michigan Constitution.

Affirmed.

/s/ Roman S. Gribbs
/s/ Donald E. Holbrook, Jr.
/s/ Nicholas J. Lambros

[1]In People v Whalen, 390 Mich 672, 683; 213 NW2d 116 (1975), the Michigan Supreme Court expressly declined to rule on the constitutionality of systematic road block stops.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,

Plaintiffs,

vs NO: 86-613-063-CZ

THE MICHIGAN DEPARTMENT OF STATE POLICE and GERALD L. HOUGH, Director of the Michigan State Police,

Defendants.

ORDER

At a session of said Court, held in the City-County Building, Detroit, Michigan, on JUNE 24, 1986.

PRESENT: THE HONORABLE MICHAEL L. STACEY
Circuit Court Judge

The Court being fully informed in the premises, and for the reasons stated in the foregoing Opinion,



IT IS HEREBY ORDERED AND ADJUDGED that defendants' plan as reflected in the aforementioned Guidelines, to conduct sobriety checkpoints is declared to be violative of United States Constitution, Amendment IV, and Michigan Constitution 1963, Article 1, Section Eleven.

IT IS FURTHER ORDERED AND ADJUDGED that defendants, their agents and employees, be and they are, permanently restrained and enjoined from implementing the aforementioned plan to conduct sobriety checkpoints.

MICHAEL L. STACEY
MICHAEL L. STACEY, Judge
Third Judicial Circuit Of Michigan

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,

Plaintiffs

vs NO. 86-613-063-CZ

MICHIGAN DEPARTMENT OF STATE POLICE and GERALD L. HOUGH, Director of the Michigan State Police,

Defendants.
_____/

OPINION OF THE COURT

THE HONORABLE MICHAEL L. STACEY
(P20866)



## I. INTRODUCTION

### A. Procedural History

This is an action for declaratory judgment and injunctive relief. In the complaint, plaintiffs[1] challenge the validity of a plan of the Michigan Department of State Police and its director Colonel Gerald L. Hough, the defendants herein, whereby the State Police, along with other police agencies, would be directed to establish checkpoints on state trunklines, the purpose of which would be to "monitor traffic for driver sobriety" (Complaint ¶ 16; Complaint, Exhibit B, p 4). Plaintiffs contest the validity of the plan on essentially two grounds. First, plaintiffs assert that the plan is violative

[1]The action is prosecuted on behalf of six individuals, all of whom are alleged to be licensed drivers of the State of Michigan and who regularly travel throughout the State in their automobiles.

of their constitutional rights as guaranteed under both Michigan Constitution 1963, article 1, § 11 and United States Constitution, Am IV. (Id., Counts I and II). Second, plaintiffs contend that the State Police have no authority under state law to implement a plan establishing sobriety checkpoints, and further that the State Police in promulgating the guidelines for the plan have not complied with the provisions of the Michigan Administrative Procedure Act (MAPA), MCLA 24.20 et seq, with regard to a state agency's rule making authority. (Id., Count II).

The case originally came before the Court on plaintiffs' motion for the issuance of a temporary restraining order. At the hearing held on said motion on May 19, 1986, the defendants agreed not to implement their plan until plaintiffs' motion for a preliminary injunction could be heard and resolved by the Court. A hearing on this latter motion was scheduled for May 29, 1986. At that time the parties commenced to put into evidence, proofs relative not only to the issuance of a preliminary injunction, but also to the ultimate merits of the issues of the case. Inasmuch as both parties were prepared to go to trial on the merits of the case, the parties stipulated that the proceedings commencing on May 29, 1986 before the Court would indeed constitute the trial on the ultimate merits of the case. The defendants also agreed to further delay implementing their plan until this Court reached its decision.[2] Thus, the Court need



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[2]At this point, the Court expressly commends the spirit of cooperation shown by the parties in this action. The highly professional manner that counsel for both sides represented their parties' interests enabled the Court to reach a timely decision on the merits of the case.

not rule on whether a preliminary injunction should have issued, but rather may now reach the merits of plaintiffs' request for declaratory judgment and the issuance of a permanent injunction.

B. Declaratory Judgment Is Appropriate In The Case At Bar.

Under MCR 2.605(A)(1) the Court is empowered to entertain an action for declaratory judgment in the following situation:

> "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted."

The purpose and requirements of this rule were noted in Shavers v Attorney General, 402 Mich 554, 588-589 (1978):

> The declaratory judgment rule was intended and has been liberally construed to provide a broad, flexible remedy with a view to making the courts more accessible to the people. 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed). Committee Comment, p 583; Comm'r of Revenue v Grand Trunk W R Co., 326 Mich 371, 375; 40 NW2d 188 (1949).



> The existence of an "actual controversy" is a condition precedent to invocation of declaratory relief. In general, "actual controversy" exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights. Updegraff v Attorney General, 298 Mich 48, 52; 298 NW 400 (1941); Flint v Consumers Power Co, 290 Mich 305, 309-310; 287 NW 475 (1939); see also, Welfare Employees Union v Civil Service Comm, 28 Mich App 343, 350-351; 184 NW2d 247 (1970).
>
> This requirement of an "actual controversy" prevents a court from deciding hypothetical issues. However, a court is not precluded from reaching issues before actual injuries or losses have occurred. Merkel v Long, 368 Mich 1, 11-14; 117 NW2d 130 (1962). Also, before affirmative declaratory relief can be granted, it is essential that a plaintiff, at a minimum, pleads facts entitling him to the judgment he seeks and proves each fact alleged, i.e., a plaintiff must allege and prove an actual justiciable controversy. See Kuhn v East Detroit, 50 Mich App 502; 213 NW2d 599 (1973).
>
> Therefore, what is essential to an "actual controversy" under the declaratory judgment rule is that plaintiffs plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised. (emphasis in original).

In the case at bar, it was uncontested that plaintiffs are all licensed

drivers who regularly travel throughout the State and thereby utilize the roads. At trial, it was established that under the plan, sobriety checkpoints could be located in any county of the State. It is obvious therefore, that were defendants' plan implemented, plaintiffs' ability to use the roads of this State would be affected, and their persons subjected to alleged unconstitutional seizures. In this sense, therefore, plaintiffs have presented an actual controversy which may be properly addressed by way of a declaratory judgment action.[3] Given the

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[3]It is recognized that unlike the overwhelming majority of cases to consider the constitutional validity of sobriety checkpoints, this case does not involve claimants who are suspected of criminal activity. Yet this fact is of little moment since the constitutional guarantees against unreasonable searches and seizures obtain at all times, not just when the police suspect a person of criminal conduct. McDonnell v Hunter, 612 F Supp 1122, 1127 (DC Iowa, 1985).



importance of the issues presented in plaintiffs' action, and that there is an actual controversy stated therein, the Court will exercise its discretion and proceed to decide the merits of the declaratory judgment action.[4]

II. STATE LAW CLAIMS

While plaintiffs assert that the implementation of the defendants' plan would violate their constitutional rights, it is also contended that the plan is invalid under

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[4]The Court would note in support of its conclusion, that the constitutional issues presented herein have been adjudicated by way of a declaratory judgment action in at least one other case. See Ingersoll v Palmer, 175 Cal App 3rd 1028; 221 Cal Rptr 659 (1985). The Court would further note that at no time during these proceedings did defendants challenge the appropriateness of a declaratory judgment action in this case or the standing of the plaintiffs to bring the action.

state statutory law. The Court addresses these nonconstitutional issues first under the well established principle that courts do not reach constitutional questions if the case might fairly be disposed of on other grounds. Port Huron & D R Co v Dept. of Treasury, 106 Mich App 413, 421 (1981).

A. Defendants' Guidelines Do Not Violate the MAPA.

Plaintiffs contend that the plan to establish sobriety checkpoints, as stated in the Sobriety checkpoint Guidelines (Plaintiffs' Ex. 1), is a rule, as the term is defined in the MAPA, and that the defendants violated the provisions of the MAPA in promulgating the Guidelines.

What is and what is not a rule under the MAPA is set forth in section 7 of the MAPA, MCLA 24.207, which states in relevant part:



"Rule" means an agency regulation, statement, standard, policy, ruling or instruction of general applicability, which implements or applies law enforced or administered by the agency, or which prescribes the organization, procedure or practice of the agency, including the amendment, suspension or rescission thereof, but does not include the following:

(b) A form, with instructions, an interpretive statement, a guideline, an informational pamphlet or other material which in itself does not have the force and effect of law but is merely explanatory.

Under section 41 of the MAPA, MCLA 24.241, before an agency adopts a rule, an agency must undertake to give public notice of and hold public hearings on the proposed rule and transmit copies of the notice to certain specified agencies and persons. Section 43(1) of the MAPA, MCLA 24.243(1), provides, inter alia, that rules not promulgated in accordance with section 41 are not valid.

In the instant case it was established at trial that the defendants did

not comply with the public hearing requirements of section 41, supra. Thus, unless some exception to what is deemed a rule under section 7, supra, applies, the Court would be constrained to conclude that the plan as formulated in the Guidelines is invalid.

In response, defendants assert that the plan is not a rule, but rather falls within any one of the exceptions found in subsection g, h, or j of section 7, supra.

While the Court expresses no opinion as to whether the Guidelines fall within subsection g or j, the court does find that the Guidelines are a type of interpretive statement or guideline which in itself does not have the force and effect of law; rather it is merely explanatory, and thus falls within the ambit of the exception in subsection (h) of section 7, supra.

The substance of the plan is



reflected in the Guidelines. As stated in the Guidelines, p 1, the purpose of the Guidelines are, inter alia,

> B. To provide policy and procedural guidelines by which a pilot program for sobriety checkpoints is to operate in Michigan.
>
> C. To provide checklists of recommended equipment for conducting sobriety checkpoints.

It is apparent from this statement, as well as the stated testimony, that the purpose of the guidelines was to advise members of the State Police as to the proper method of conducting sobriety checkpoints. Thus, the guidelines are akin to other manuals regularly handed out to police by their departments on how to conduct certain sorts of police operations. The Court is unaware of any authority, nor has plaintiffs cited any, which suggests that internally distributed police operational manuals

constitute rules as the term is used in the MAPA. The Court, therefore, concludes that the guidelines fall within the exception to what constitutes a rule under subsection h of section 7, supra.

B. Defendants are Superficially Authorized under State Law to conduct Sobriety Checkpoints.

Plaintiffs also contend that defendants have no authority under state law to implement sobriety checklanes. In response, defendants rely on the provisions of MCLA 257.715(2).

MCLA 257.715(2) provides:

> (b) The director of the department of state police shall cause inspection to be made of motor vehicles operating on the public highways to detect defective equipment or other violations of law governing the use of public highways by motor vehicles, operators and chauffeurs. For such purpose he may establish temporary vehicle check lanes at appropriate locations throughout the state for checking such inadequacies and violations. A county, city, village or township police department may also operate such a temporary check lane within its limits with the express authorization of the director and under the direct supervision of a designated representative of the director. (Emphasis added)



Subsection b of MCLA 257.715 was added to the statute by way of amendment enacted in 1966 PA 214. Prior to this amendment the statute only authorized police officers to stop vehicles for safety inspections upon "reasonable grounds." MCLA 257.715 prior to amendment had been construed to be directed at the control of the operation of unsafe vehicles. People v Lee, 371 Mich 563 (1963). However, the amendment specifically provides for an expansion of the purpose for which the police may stop and check vehicles since the unambiguous language of subsection b refers not only to equipment violation, but to "other violations of law governing the use of public highways by . . . operators."

Significantly, as pointed out by defendants, when subsection 2 was in the legislature, motions were made to delete this language, but were defeated. The Court therefore finds that the purpose of subsection 2 is not merely limited to the enforcement of the laws regarding motor vehicle equipment, but also other laws pertaining to "the use of public highways by . . . operators." This being so, it must follow that MCLA 257.265(2) can be used by the police to enforce the drunk driving laws, since, literally, the statute prohibiting driving while intoxicated, is a law governing the use of the public highways by operators.[5] There, thus appears to be statutory authority for the establishment of sobriety checkpoints.

However, notwithstanding this apparent statutory authorization, plaintiffs,

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[5]Most courts that have considered the question have held that statutes which provide for the establishment of roadblocks for



nonetheless, challenge the constitutionality of the establishment of sobriety checkpoints as contemplated in the Guidelines.[6] Because

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the more limited purpose of checking for equipment violations cannot be used as authority to establish sobriety checkpoints. Webb v State, 695 SW2d 676, 677 (Tex App 1985); State v Smith, 674 P2d 562 (Okla Crim App 1984); State ex rel Ekstrom v Justice Court of the State of Arizona, 136 Ariz 1, 663 P2d 992, 996 (1983); also see, State v Cloukey, ___ Me 486 A2d 143, 146-147 (1985); contra, People v Bartley, 109, 111 2d 273, 93 111 Dec 347, 486 NE2d 880, 889 (1985). Because of this Court's conclusion that MCLA 257.265(b) could be read as authorizing sobriety checkpoints, the Court need not decide whether a more limited statute could be used.

In another case, the absence of express statutory authorization was not deemed fatal since the Court found that the requisite authority was implied in law enforcement officers' statutory authority to enforce criminal laws. Ingersoll v Palmer, supra, 221 Cal Rptr at 665. Again, due the Court's conclusion, the Court need not determine whether the State Police, as claimed by the testimony of Col. Hough, indeed would have implied authority to set up sobriety checkpoints.

[6]Indeed, should plaintiffs' constitutional arguments prove persuasive, this would perforce preclude construing the statute to authorize an unconstitutional practice.

plaintiffs' claims as to statutory law have proved to be without merit, it is to the constitutional claims that the Court now turns.

III. CONSTITUTIONAL CLAIMS

A. Preliminary Findings of Fact

Before delving into the intricacies of the arguments concerning the plan's constitutionality, it is appropriate to outline what the plan, as provided for under the Guidelines, and/or described by the various witnesses for the defendants, generally provides for and how it came to be established. In this regard, the Court makes the following findings of fact.[7,8]

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[7]Other findings of fact will be made in the body of the discussion relative to specific issues pertinent to the constitutionality of the plan.

[8][The original text did not contain a footnote 8].



In 1984, in response to the annual carnage caused by drunk drivers on our state's roads, Governor Blanchard established the Drunk Driving Task Force to provide him and the legislature with proposals to curb drunk driving. The Task Force issued 35 recommendations. One of these was the establishment of sobriety checkpoints. In brief, these checkpoints would be established along state trunklines pursuant to specific guidelines. All motorists would be stopped when reaching a checkpoint and would be examined for signs of intoxication. The stops would be made regardless of whether the police had any articulable suspicion that the particular driver was intoxicated or otherwise engaged in wrongful activity. The stops would be made without warrants.

According to the testimony of Col. Hough, who was a member of the Task Force,

the purpose of the checkpoints would be primarily to deter, and only secondarily, to apprehend drunk drivers. The recommendation was made on the basis of studies made in other states where such checkpoints have been established. The study especially relied on was that done on the pilot program conducted in Maryland. And, indeed, the plan ultimately adopted by defendants was largely modeled on the Maryland plan. From these studies and from conversatons held with other states' law enforcement personnel, he, and other members of the State Police, concluded that such checkpoints could be a good technique to deter drunk drivers. He admitted that at the time, however, he did not have, nor does he presently have, any empirical evidence to support this conclusion. In contrast, he was aware, statistically, that other states were achieving only low rates of



drunk driving arrests by the use of this technique.

After these recommendations were set forth in 1984, Col. Hough, due to legislative opposition, did not attempt to implement sobriety checkpoints. He did so in 1986 on the directive issued by Governor Blanchard in his State of the State Address made in January, 1986.

Pursuant to the Governor's directive, the aforementioned Guidelines were drafted in February and March of this year in order that a test program might be set up. One sobriety checkpoint was actually conducted in May, 1986 in Saginaw County. Thereafter, this lawsuit was commenced.

B. The Plan is Violative of the Fourth Amendment.

While plaintiffs challenge the validity of the plan under both Mich Const, 1963,

art 1, § 11, and US Const, Am IV, the Court will first review the plan's constitutionality under the Federal Constitution. In order to do so, however, it is first necessary to determine the appropriate test used in adjudging plaintiffs' Fourth Amendment claims within the factual context of this case.

1. The Appropriate Test Under the Fourth Amendment.

Initially, it should be noted that the Michigan Supreme Court has expressly declined to pass upon the constitutionality of systematic roadblock stops. People v Whalen, 390 Mich 672, 683 (1973). Thus, there is no Michigan precedent which addresses the Fourth Amendment issue, as presented by the instant case. Yet, this Court does not write on a totally clean slate. Rather, the Court is aware of a substantial



body of existing appellate authority from other States which have passed upon the issue. To date, there are approximately 28 state appellate decisions addressing the issue and which, at least within their own respective jurisdictions, remain extant. In reviewing the substance of these decisions, the Court is initially struck not only by the divergent results reached, but also by the dissimilarity of the methods of analysis used to reach those results.

Some of the cases holding sobriety checkpoints constitutional do so in whole or in significant part merely on the dicta in Delaware v Prouse, 440 US 648, 663; 99 S Ct 1391, 59 L Ed 660 (1979), which indicates that at least for some purposes, stationary roadblock checkpoints could be constitutionally permissible. Kinslow v Commonwealth, 660 SW2d 677, 678 (Ky App, 1983), State v

Goines, 16 Ohio App 3rd 168; 473 NE2d 1219, 1222 (1984).

Others rely on a balancing test which weighs the governmental interest of curbing drunk driving against the amount of "intrusion" caused by the checkpoints, and that the balance is struck in favor of upholding the constitutionality of the check-point where the State can show that the on-the-scene officers' discretion regarding who to stop, or the location of the checkpoint, is limited by guidelines. State v Garcia, ___ Ind App ___; 481 NE2d 148 (1985); Lowe v Commonwealth, _____ VA _____; 337 SE2d 273 (1986); Commonwealth v Trumble, 396 Mass 81; 483 NE2d 1102 (1985); State v Golden, 171 Ga App 27, 318 SE2d 693 (1984). Also see, State v Goines, supra. In these cases the need for, and/or the effectiveness of, sobriety checkpoints does not appear to be a signifi-



cant factor. For example, in Garcia, supra, 153, the Court expressly rejected the necessity to show effectiveness. Also see, Trumble, supra, 383 NE2d at 1105 (no need to show lack of alternative means).

By way of contrast, other cases using the above noted balancing test, hold sobriety checkpoints to be unconstitutional where it is shown that police set up a sobriety check-point without guidelines. State v Crom, 222 Neb 273; 383 NW2d 461 (1986); State v Jones, 483 So2d 433 (Fla, 1986); State v Kirk, 202 NJ Super 28; 493 A2d 1271 (1985); State v Marchand, 104 Wash 2d 434; 706 P2d 255 (1985); Commonwealth v McGeorghehan, 389 Mass 137; 449 NE2d 349 (1983); State v Hillesheim, 291 NW2d 314 (Iowa, 1980); State v Olgaard, 248 NW2d 392 (SD, 1976). These cases read together give the distinct impression that had the police

drawn up sufficiently precise guidelines, the Courts would have upheld the constitutionality of the checkpoints. Again, no significant discussion appears in these cases regarding the need for and/or effectiveness of sobriety checkpoints as a law enforcement technique.

Another line of cases uphold or reject the constitutionality of the sobriety roadblocks, using a balancing test in which the Court weighs the thirteen enumerated factors set forth by the Court in State v Deskins, 234 Kan 529; 673 P2d 1174, 1185 (1983). See, State v Jones, supra; State v Martin, ___ Vt ___; 496 A2d 442 (1985). In this approach, not all the factors need be present in order for the sobriety checkpoint in question to be considered constitutional. Deskins, supra, 673 P2d at 1185.

Many other courts use a three part



balancing test which compares the state interests, the effectiveness and/or need for sobriety checkpoints, and the intrusion which they entail. (This latter factor focuses also upon the degree of discretion left to the on-the-scene officers). Those cases finding sobriety checkpoints constitutional using this three pronged balancing test are Ingersoll v Palmer, 175 Cal App 3rd 1028; 221 Cal Rptr 659 (1985); People v Bartley, 109 Ill 2d 273; 93 Ill Dec 347; 486 NE2d 880 (1985); People v Scott, 63 NY2d 518; 473 NE2d 1 (1984); State v Superior Court, 143 Ariz 215; 691 P2d 1073 (1984); Little v State, 300 MD 485; 479 A2d 903 (1984); State v Coccomo, 177 NJ Supe 575; 427 A2d 131 (1980). Also see, State ex rel Ekstrom v Justice Court, 136 Ariz 1, 663 P2d 992 (1983) (Feldman, Jr., conc). The following cases, however, using the three part balancing test, find sobriety

checkpoints unconstitutional. State v Muzik, ___ Minn App ___; 379 NW2d 599 (1985); Webb v Texas, 695 SW2d 676 (Tex App, 1985; State v McLaughlin, ___ Inf Spp ___; 471 NE2d 1125 (1984); State v Smith, 674 P2d 562 (Okla Crim App. (1984); State ex rel Ekstrom v Justice Court, 136 Ariz 1, 66 P2d 992 (1983). Also see, State v Crom, supra, 383 NW3d at 463-470 (Krivosha, C.J., conc); State v Koppel, ___ NH ___, 499 A2d 977 (1985) (use of balancing test under state constitution).

Thus, with perhaps the exception of those courts which would find sobriety checkpoints constitutional solely on an uncritical reliance on the dicta in Prouse, supra, courts which rule on the matter under the Fourth Amendment do so on the basis of some form of a balancing test; that is, weighing one's individual rights against society's safety and society's interest in law



enforcement. The courts which do use a balancing test, do so on their construction of prior United States Supreme Court decisions. Therefore, to determine the appropriate balancing test, this Court looks primarily to United States Supreme Court precedent construing the Fourth Amendment.

US Const Amend IV states in relevant part:

> "The right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures, shall not be violated."

With respect to seizures of persons while in their automobiles, it has been indicated that persons are inclined to expect less privacy in an automobile than they would in their homes and therefore, are not required to be given the same kinds of protection that the Fourth Amendment affords to persons in their homes. Chambers v Maroney,

399 US 42; 90 S Ct 1975; 26 L Ed 2d 419 (1970), reh'g den, 400 US 856; 91 S Ct 23; 27 L Ed 2d 94 (1970). Yet, the mere fact that an automobile is involved does not eliminate the guarantees provided by the Fourth Amendment. United States v Ross, 456 US 798; 102 S Ct 2157; 72 L Ed 2d 572 (1982); Delaware v Prouse, 440 US 648, 662-663; 99 S Ct 1391; 59 L Ed 2d 660 (1979); also see, Carroll v United States, 267 US 132, 153-154; S Ct 280; 69 L Ed 543 (1925). Thus, the stopping of an automobile and the detaining of its occupants constitutes a seizure within the meaning of the Fourth Amendment. Delaware v Prouse, supra, 440 US at 653.

Ordinarily, in order to satisfy the constitutional guarantee against unreasonable seizures, in the absence of a warrant, and absent other exceptions to the warrant requirement not applicable herein, the police



are required to have an individualized and articulable suspicion of wrongdoing before stopping an automobile for investigatory purposes. Delaware v Prouse, supra, 440 US at 662; United States v Brignoni-Ponce, 422 US 873; 95 S Ct 2574; 45 L Ed 2d 607 (1975). Yet, it has been recognized that "the Fourth Amendment imposes no irreducible requirement of such suspicion." United States v Martinez-Fuerte, 428 US 543, 561; 96 S Ct 3074; 49 L Ed 2d 1116 (1976). Rather, the reasonableness, and thus the constitutionality, of seizures that are less intrusive than a traditional arrest, such as are at issue in the instant case, depend, as summarized in Brown v Texas, 443 US 47; 50-51; 99 S Ct 2637; 61 L Ed 2d 327 (1979):

> "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."
>
> Consideration of the constitutionality of such seizures involves a weighing of the

> gravity of the public concerns served by the seizure advances the public interest, and the severity of the interference with individual liberty. (authorities omitted)

In formulating this test,the Court in Brown principally noted three of its prior decisions. United States v Brignoni-Ponce, supra; United States v Martinez-Fuerte; and Delaware v Prouse, supra. These cases merit some attention, since all three involved the question of under what circumstances the police could stop a motorist for investigatory purposes without having an articulable individualized suspicion of wrongdoing. These cases, therefore, shed some light on how the balancing test enuciated in Brown, is to be applied.

In Brignoni-Ponce, the United States Border Patrol, operating near the Mexican-American border while on roving patrol, stopped an automobile to investigate whether



the car was carrying illegal aliens. The Border Patrol had no suspicion that the vehicle stopped was being used to transport illegal aliens. The Court held the stop and attendent seizure of the automobile's occupants to be violative of the Fourth Amendment. The Court initially noted the enormity of the problem of the entry of illegal aliens into the country, and held that the government had shown not only a keen public interest in the problem, but also that roving patrols advanced this interest in that "They succeed in apprehending some illegal entrants . . . and they deter the movement of others by threatening apprehension . . ." Id., 422 US at 879. Against these two factors the Court weighed the interference with individual liberty based on the fact that the stop typically lasted less than a minute and the inspection was limited to those parts of

the vehicle which could be readily seen. Only one or two brief questions were asked of drivers concerning their citizenship.

Balancing these factors, the Court found that the Border Patrol did not need probable cause to stop the car, but that a reasonable suspicion would suffice. The Court, however, refused to dispense with the requirement of reasonable suspicion, because of the unlimited discretion given the Border Patrol. Id., 422 US at 882-883.

In United States v Martinez-Fuerte, the Court upheld the constitutionality of permanent checkpoints established by the Border Patrol near the Mexican-American border on major highways which stopped and checked all vehicles entering the country for the purpose of investigating whether the vehicle was carrying illegal aliens. Once again the Court noted the enormity of the



problems in controlling the flow of illegal aliens into the country along the Mexican-American border. A valid public concern was therefore found. The Court also noted that in fiscal 1973, traffic checking operations had apprehended approximately 55,300 deportable aliens or approximately 25% of the total deportable aliens siezed in that year throughout the country. Most of these checking operations were done at permanent border checkpoints. Id., 428 US at 553. The Court concluded that the government had shown the "substantiality of the public interest in the practice of routine stops for inquiring at permanent checkpoints." Id., 428 US at 556. On the other hand, the Court found that the alternative of requiring stops on major inland routes always be based on reasonable suspicion, to be impractical, because of the heavy flow of traffic, and because such a

requirement "would largely eliminate any deterrent to the conduct of well-disguised smuggling operations." Id., 428 US at 557. In so finding, the court noted that the petitioner had failed to "suggest persuasively that the particular law enforcement needs served by the checkpoints, could be met without reliances on routine checkpoint stops." Id., 428 US at 556, Fn 12.

With respect to the intrusiveness of the stop, the Court distinguished between the objective nature of the intrusion into an individual's privacy interest as opposed to the subjective nature of the intrusion. As to the former, the Court found the intrusion minimal, based on the brief period of time that most stops took, and the limited nature of the investigation.

The subjective nature of the intrusion was also held to be minimal. The Court



noted that the checkpoints were permanent and thus, "motorists using these highways are not taken by surprise as they know or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere," Id., 428 US at 559. Secondly, the Court noted that the officers operating the checkpoints had minimal discretion as to whom to stop. Also, the limited discretion of the officers in the field was further circumscribed by the fact that the location of the checkpoints was determined by superior officers. Id., 428 US at 559.

In balancing all of these factors the Court upheld such checkpoints based on the presence of a) the public interest and legitimacy of such stops, b) the need for this particular enforcement technique being demonstrated, and c) the reasonableness of the procedures involved which lessened both

the objective and subjective nature of the intrusion. Id., 428 US at 562.

Lastly, in Delaware v Prouse, supra, the Court held that a police officer's stop of a motorist in order to check the validity of the motorist's license and vehicle registration was unconstitutional where the policeman had no suspicion of wrongdoing. In so holding, the Court first looked to the State's interest, and found that it has "a vital interest in ensuring only those qualified to do so are permitted to operate motor vehicles, and these vehicles are fit for safe operation." Id., 440 US at 658. The Court then examined "whether in the service of these important ends, the discretionary spot check is a sufficiently productive mechanism." Id., 440 US at 559.

In this latter inquiry, the Court first noted that spotchecks did not appear to



be "sufficiently productive" in terms of actually apprehending unlicensed drivers or deterring them from driving. The Court reasoned that unlicensed, and hence unsafe drivers, were more likely to be found among those who committed traffic violations. Thus, the police would be more likely to apprehend unlicensed drivers, not by randomly searching from among the population of all drivers, the vast majority of whom were presumed licensed to drive, but rather among those who drive unsafely or committed traffic violations. 440 US at 659-661. The Court also found thereby, that the police had available to it alternative means which were based on the constitutionally approved standard of reasonable suspicion for stopping and checking a motorist's license and registration. This further indicated that there was no need for this police procedure. Id.

Finally, the Court noted that because of the lack of standards, the police in making spot-checks had unfettered discretion as to when stops would be made and as to who would be stopped. Accordingly, there was deemed to be a substantial intrusion to a person's privacy interests. Id., 440 US at 661-663.

The balancing of these factors by the court, led it to hold that the police were required to have a reasonable suspicion of wrongdoing before stopping and seizing an individual motorist to check his or her driver's license and the registration of the automobile. Thus, the seizure of the motorist in the case before it was held violative of the Fourth Amendment. Id., 440 US at 663.

However, the Court did not stop at this point, but went on to state the following dicta:



> This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. (text of footnote omitted).

In applying the foregoing to establish a test to adjudge whether sobriety checkpoints are valid under the Fourth Amendment, the Court notes that the dicta in Prouse is not controlling.

First, the Court notes that the dicta in Prouse was stated without the Court fully delineating the factors which had caused it to sustain or strike down analogous police practice.

Moreover, in light of the holding reached in Prouse, its dicta appears confusing. This point is made clear by the Washington Supreme Court in State v Marchand, supra, 706 P2d:

> From Prouse, therefore, we have a clear holding that this type of stop is invalid particularly because the efficiency of the "spot check" stop is not proven in the record. But, added to that we have confusing dicta that asks us to believe that the stopping of all traffic is somehow less intrusive to a particular motorist than the stopping of that motorist alone. The logic of this belief escapes us.

Also see, State v Crom, supra, 383 NW2d at 468 (Krivosha, C.J., conc.).

Finally, the dicta in Prouse, to the extent that it may be taken as authorization for checkpoints to check for a valid driver's license and registration, is inapplicable to a case involving a sobriety checkpoint, due to the ability of police to more readily identify drunk drivers as opposed to those driving without a valid license or vehicle registration. This point is explained by the Court in State v Cloukey, 486 A2d 143, 147 (Me. 1985). In Cloukey, supra, 146-147, the Court while upholding the constitutionality



of a license/registration checkpoint, distinguished the case before it from that involving a sobriety checkpoint:

> This case does not involve a sobriety stop. There may be many effective ways of detecting a drunken driver without intruding on the rights of the citizen. A trained eye can readily spot erratic operation. The unlicensed driver, however, displays no observable characteristics. If a license check under any circumstances is unreasonable, then in most instances, public protection must await the commission of another offense.

Because the Court does not find the dicta in Prouse controlling, the Court would further find that reliance on cases such as Kinslow, supra, and Goines, is misplaced.

The Court is thus left to apply a balancing test. A review of the test developed in Briqoni-Ponce, Martinez-Fuerte, and Prouse, and synthesized in Brown, all lead the Court to conclude that a balancing test which only looks to the validity of the state interest as measured against the presence or

non-presence of an administrative plan to conduct sobriety checkpoints is insufficient. Clearly, the second prong of the test as stated in Brown requires a court to examine the extent to which a sobriety checkpoint furthers the state interest, and as exemplified in Prouse, and Martinez-Fuerte, this inquiry also entails whether there is an alternative procedure which can be more properly used. Accordingly, the Court finds those cases noted above which base their result on merely whether the police have a reasonable plan-not persuasive, at least in terms of what test is to be applied.

This conclusion also renders the thirteen factored approach of Deskins suspect as well. As noted earlier, in using this approach, not all of the factors need be found in order to uphold the constitutionality of a particular checkpoint. An examina-



tion of the substance of these factors shows that the great majority of them pertain to the adequacy of police guidelines. Only two pertain to the effectiveness of the program. Thus, a court employing the Deskins approach could easily come to the conclusion that sobriety checkpoints were constitutionally permissible so long as the state had showed that the factors pertaining to the adequacy of guidelines were present. A court would therefore not have to examine closely how effective a sobriety checkpoint was. Indeed, the sense of the Deskins opinion indicates that this is precisely how the majority reached its result in sustaining the constitutionality of the checkpoint before it. See State v Deskins, supra, 673 P2d at 1187 (Prager, J., diss.). Thus, while the factors listed in Deskins might be of some use in identifying which plans insure that the

intrusion occasioned by the checkpoints is kept to a minimum, -- the factors given in Deskins cannot be seen by themselves to set forth the appropriate constituional test.

In contrast with the noted approaches, many cases adhere to a three part balancing test. The Court finds this test to be in substantial conformity with the three part balancing test stated in Brown. These cases, therefore, appear most relevant to the resolution of the constitutional issue herein. The Court in its decision will therefore follow the lead of these cases and examine the matter through the use of the Brown balancing test.

2. Findings of Fact Relative to the Factors of the Brown test.

A. State Interest

The first factor of the Brown test addressed the gravity of the public concern



which is assertedly served by the seizures in question. See, State v Muzik, supra, 379 NW2d at 602; People v Scott, supra, 473 NE2d at 4. In the instant case it is largely conceded by all that the State has a keen interest in curbing drunk driving. It is true that the testimony presented gave varying figures as to exactly how many persons were killed or maimed as a result of intoxicated drivers.[9] Yet, the dispute over precisely how many persons die or are injured as a result of drunk drivers is largely a dispute over the degree of the problem, not

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[9]For example, Lt. Downer, of the Michigan State Police, testified that in 1984, there were 1392 fatal motor vehicle accidents in the State. Of these, he estimated that in 704, or more than 50% of these, alcohol was a contributing factor. On the other hand, Dr. Lawrence Ross, a nationally recognized expert in the field of law enforcement problems in curbing drunk driving, estimated the national rate of fatal accidents caused by alcohol to be 25% of all accidents.

whether or not a serious problem does exist. As noted in South Dakota v Neville, 459 US 553; 103 S Ct 916, 74 L Ed 2d 748 (1983): "The carnage by drunk drivers is well documented and needs no detailed recitation here." Also see, People v Bartley, supra, 486 NE2d at 885 (and cases cited therein). As a factual matter, the Court therefore finds that there is a grave and legitimate State interest in curbing drunk driving.

B. Effectiveness

The second element of the Brown test examines the degree to which the seizure advances the public concern involved. See State v Muzik, supra; Ingersoll v Palmer, supra, 221 Cal Rptr at 666. As exemplified in the treatment accorded this issue in Martinez-Fuerte and Prouse, as recounted above, the degree to which particular law



enforcement techniques furthers the particular state concern in question, depends upon not only inquiring into how effective the technique is, but also examining the degree to which it can be said that there are no permissible alternative means available to the police which advance the particular state concern. This factor inquires not only into the effectiveness, but also the need for a particular practice. The Court first examines whether sobriety checkpoints are an effective means of curbing drunk driving.

In the case at bar, the defendants argued throughout, that the effectiveness of sobriety checkpoints should be determined not on the degree to which checkpoints effectuated the arrests of drunk drivers, but rather the extent to which they deter persons from drinking and driving. Thus, defendants, in effect, assert that the Court need not

look too closely at the ability of roadblocks to effectuate the apprehension of drunk drivers. The Court notes that defendants' argument appears to be supported by the treatment of the issue found in Ingersoll v Palmer, supra, 221 Cal Rptr at 666-667; People v Scott, supra, 473 NE2d at 5-6; and State v Superior Court, supra, 1076-1077.

This Court, however, does find that the ability of sobriety checkpoints to generate the arrest of drunk drivers is relevant to our inquiry.

First, as the above discussion of the analysis in Martinez-Fuerte, and Prouse shows, the ability of a particular law enforcement technique to effectuate arrests in furtherance of a public concern was clearly a relevant factor in the Court's discussion. Thus, the treatment of the issue in the United States Supreme Court cases indicates



that this Court should examine the degree to which sobriety checkpoints effectuate arrests.

Second, and perhaps more importantly, based on the evidence adduced at trial, the court finds that the degree to which a particular law enforcement program can be successful in achieving arrests must be seen as directly related to the program's usefulness in deterring a problem.

In this regard, the Court notes that Dr. Ross testified that the extent to which any law enforcement program actually served to deter potential wrongdoers was largely premised on there being a public perception that if a person broke the law he or she would be caught and speedily punished. Thus, a program could be deemed an effective deterrent mechanism if the public perceived that program as being capable of increasing a

wrongdoer's chance of being caught and punished.

Dr. Ross's observations as to what constitutes an effective deterrent program is borne out by the published goal of sobriety checkpoints, as stated by the defendants themselves, in a brochure explaining why sobriety checkpoints were being implemented. The defendant's brochure states in part:

> "Sobriety checkpoints are not a new idea. They have been used as an effective tool in 39 other states. The risk of being detected and apprehended serves as a deterrent to drunk drivers."
> (Defendants' Exhibit 12, emphasis added).

The Court concludes from this evidence that the concept of the deterrent effect of a given program, is linked to the degree to which a program is effective in apprehending wrongdoers. This is so, since if a program was not, in fact, an effective tool in achieving arrests, the public would



soon learn of or come to perceive this, and the "deterrent" effect (i.e., the ability of a program to make the public believe that they will be apprehended and brought to justice by dint of the implementation of the program if they violate the law which the program is designed to further) will naturally decline.[10]

Accordingly, for the foregoing reasons the Court proceeds to examine the degree to which sobriety checkpoints are an effective tool in achieving arrests of drunk drivers.

Dr. Ross testified that on a national average less than 1% of the drivers

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[10]Again, the Court notes that Dr. Ross opined that the deterrent effect of a law enforcement program would diminish rapidly if the public came to percelve that the program did not achieve what its promoters said it would. Dr. Ross's testimony as to effect was essentially uncontradicted.

who pass through sobriety checkpoints are actually drunk, and thus, the chances of apprehending drunk drivers at sobriety checkpoints were slim. He further stated that he knew of no study which indicated that sobriety checkpoints were resulting in a high yield of arrests or that it was worthwhile as a technique to achieve a high rate of arrests.

Dr. Ross's testimony as to the statistical indications of the effectiveness of sobriety checkpoints in effectuating arrests is corroborated by the testimony of witness, Lt. Cotton of the Maryland State Police. He reported that Maryland had used sobriety checkpoints for the past several years. During this period of time 125 checkpoints had been operated. Approximately 41,000 motorists had passed through them, yet only 143 persons, or less than 1% of those passing



through, were arrested for drunk driving.

Additionally, Col. Hough testified that in the one sobriety checkpoint operation carried out in May of this year in Michigan, of 126 cars that were stopped, two persons were arrested for drunk driving. While the percentage is slightly more than 1 1/2%, the Court finds the results of the Michigan sobriety checkpoint also corroborate, in general, Dr. Ross's testimony that checkpoints would yield an extremely low rate of arrests.

In addition to this evidence, the figures available in the reported appellate decisions of other states, for the most part, further bear out Dr. Ross's initial observations. See State v Justice Court, supra, 663 F2d at 993 (of 5763 motorists stopped, 14 arrested for drunk driving); State v Deskins, supra, 673 P2d at 1187 (between 2,000 and

3,000 persons stopped, 15 arrested for drunk driving); State v McLaughlin, supra, 471 NE2d at 1137 (in one county, 115 cars stopped, 3 persons arrested for drunk driving; in another county, 8 - 10 roadblocks set up, each stopped between 90 - 150 cars, some resulted in no arrests, one resulted in 5 arrests); State v Garcia, supra, 481 NE2d at 154 (100 cars passed through checkpoint, 7 persons arrested for drunk driving); Ingersoll v Palmer, supra, 221 Cal Rptr at 661 (233 motorists stopped, no arrests for drunk drivers); State v Crom, supra, 383 NW2d at 469 (police conduct biweekly roadblocks for 50 weeks; No evidence adduced showing any arrests for drunk driving). While the roadblock under review in Garcia produced a 7% rate of apprehension, in view of the results in other states, the figure appears more as an exception rather than a true indi-



cator as to how effective checkpoints are in effectuating drunk driving arrests. The figures adduced in these other states all indicate an extremely low rate of arrests per motorist stopped, and further serve to corroborate Dr. Ross's initial observations regarding the lack of effectiveness of checkpoints in achieving significant numbers of arrests for drunk driving.

The above evidence leads the Court to conclude that sobriety checkpoints have not been shown to be an effective means for apprehending drunk drivers.

The Court next examines the issue of the deterrent effect of checkpoints in curbing drunk driving. In these proceedings, the evidence adduced relevant to checkpoints' deterrent effect was found in statistical data and on the personal observations and opinions of various witnesses.

With regard to statistical data relevant to the issue of deterrence, the Court would initially note that Col. Hough testified that at the time that he formulated the recommendation to implement checkpoints, as well as presently, he knew of no emperical evidence which showed that sobriety checkpoints had a deterrent effect on drunk driving.

Lt. Cotton of the Maryland State Police, however, testified as to what he believed were the effects in Maryland in having instituted sobriety checkpoints. Sobriety checkpoints were first introduced in Maryland in the latter portion of December, 1982. The statistics given by Lt. Cotton indicated that after 1981, i.e., for the years 1982, 1983, 1984, the rate of fatal alcohol related accidents, of drivers involved in alcohol related accidents who



were found to have a significant level of blood/alcohol ratio, and the rate of multi-car accidents caused in part by alcohol had all fallen. The Court would note, however, that the most significant drop in these years occurred between 1981 and 1982, and that in 1983 and 1984, the rates of the three above-mentioned catagories variously rose and fell. Finally, it was established that beginning in the first part of 1982, Maryland instituted numerous other programs designed to curb drunk driving.

These statistics thus cannot be found to be convincing evidence of deterrence for the following reasons. First, the Court notes that the most significant drop in the numbers referred to above, all occurred in 1982 compared to 1981. Yet, sobriety checkpoints were implemented only in the last weeks of 1982. Given the presence of other

new anti-drunk driver programs being implemented through 1982, it is not reasonable to credit only the implementation of checkpoints with the drop in statistics related to drunk driving problems. Moreover, in the two full years that sobriety checkpoints were implemented, these numbers rose and fell within a few percentage points of the previous year's rate. These statistics thus reveal little, if anything, which tends to confirm such checkpoints' deterrent effect.

Lt. Cotton also based his opinion that sobriety checkpoints did deter drunk driving on the basis of statistics which showed that in the years 1983 through 1985, those counties which implemented checkpoints had an overall decrease in alcohol related accidents. Yet, again, a closer look at the study relied on by Lt. Cotton shows that the results are equivocal, since the study showed



that in many of the counties which had sobriety checkpoints, alcohol related fatalities rose, while in other counties which did not implement checkpoints, alcohol related fatalities dropped. These numbers, thus, do not suggest anything close to unqualified support for concluding that sobriety checkpoints significantly effected the deterrence of drunk driving.

Another collection of statistical data that was referred to, was a report on the results achieved in the pilot study conducted in Maryland as to the effects of sobriety checkpoints. (Significantly, Lt. Cotton, on cross examination pointed to this study as containing the sole <u>empirical</u> evidence concerning checkpoints' efficacy.) This pilot program was conducted between December, 1982 and February, 1983. Two counties with similar demographic characteristics

were selected. Checkpoints would be implemented in one, Harford County. The other county, Frederick County, would not have sobriety checkpoints, and would thus serve as a "control" county. At the conclusion of the pilot program, statistics were compiled which compared the rate of alcohol related accidents and the rate of fatalities in both counties, with these rates of the same period in the year preceeding the pilot program, and also with the three month period immediately preceeding the start of the program. The comparative statistics indicate that comparable rates of decline in the number of alcohol related accidents in both counties occurred when compared with the statistics of the preceeding year. They also showed that



the rate of fatalities[11] actually doubled in Harford County, which had checklanes during the pilot progrm when compared with the preceeding year. At the same time, Frederick County, which did not have sobriety checklanes showed a marked decrease in fatalities.

When compared with the preceeding three month period, the data indicates both counties experienced rates of decline in alcohol related accidents. Additionally, both counties experienced declines in the rate of fatalities when compared to the data concerning the three month period immediately preceeding the test period.

To the extent that the study is

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[11]While the number of alcohol related fatalities was not revealed, from the estimates given in Lt. Downer's testimony, approximately 50% of these fatalities could be estimated to be alcohol related. Thus, it can be assumed that a large proportion of these fatal accidents were alcohol related.

based on statistically significant data, on one level, the foregoing data appears to support defendants' contention that sobriety checkpoints do serve to deter drunk drivers in that the numbers show a decrease in the rate of alcohol related accidents in the period when the pilot program was being conducted in Harford County when compared to previous time periods. Yet, this simplistic reasoning is unpersuasive.

First, as noted above, during this time period Maryland was implementing several other programs. The similarity in the decreasing rate of alcohol related injuries which occurred in both counties, checklane and non-checklane, is consistent, if anything, with an overall state wide trend.

Moreover, the Court perceives a fundamental flaw in the assumption that implementation of the checkpoints in Harford



County had a positive causal effect on that county's rate of alcohol related accidents. If this assumption is reasonable, it remains unexplained why it is also not reasonable, using this sort of crude cause-effect analysis, to assume that the implementation of checkpoints in Harford County did not also contribute to the <u>increase</u> that Harford County experienced in the rate of traffic fatalities during the time period of the pilot program. Of course, due to other unexplained factors this latter assumption may not be warranted. Yet it does serve to point out the underlying flaw in merely assuming Harford County's decrease in the rate of alcohol related accidents was due largely to the implementation of checkpoints, without some accounting for other extraneous factors.

Thus, the statistical data adduced

in this case relative to the deterrent effect of sobriety checkpoints is simply not of a sufficient persuasive value to support the conclusion that checkpoints have a deterrent effect.[12] Rather, the Court finds that this data essentially does not support the deterrent effect of checkpoints. Other evidence relative to sobriety checkpoints' deterrent effect revolved largely on the personal opinions of various witnesses.

It was Dr. Ross's opinion that such checkpoints did not have any long term, or lasting deterrent effect. That at best, such a program would only have a short term deterrent effect in the particular locale where they were implemented, and that this effect was dependent on extensive media coverage over which the police had no

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[12]The Court is aware that data cited in People v Scott, supra, 473 NE2d at 5-6, and State v Super Ct, supra, 691 P2d at 1077, which was relied on by these Courts to find a deterrent effect suffers from largely the same infirmities as the data quoted in Lt. Cotton's testimony. In particular, in Scott the Court was able to identify consistent overall decreases in the rate of alcohol related accidents and fatalities in the years subsequent to instituting checkpoints. Yet, the Court also concluded that during these years, the State had implemented numerous other anti-drunk driving programs.

Thus, it was not revealed the extent to which implementing checkpoints caused this decline. While this Court would agree with Scott that the State need not "spell out the exact efficiency coefficient of each component" Id., in this Court's view, in light of the constitutional issue involved, there must be some positive showing of deterrence beyond mere conjecture or assumption. This Court therefore does not find the data compiled in these decisions to be of any persuasive effect.



control. That at worst, such a program could have a counter productive effect in nearby area, since due to the extensive manpower needed to maintain checkpoints, persons wishing to drink and drive or who wished to commit other crimes would feel safe to do so, since significant law enforcement resources

were being directed elsewhere.

Dr. Ross's opinion was corroborated by the testimony of the Sheriffs of Wayne, Macomb and Kalamazoo Counties. It was their consistent professional opinion, based on what they knew of checkpoints, that they did not believe checkpoints to be an effective deterrent.

In contrast, both Col. Hough and Lt. Cotton stated their belief in the deterrent effect of sobriety checkpoints. Apart from statistical data, they based their opinion on what they perceived public opinion to be, and on anecdotal evidence.

In assessing the weight to be given this testimony, the Court notes that of the above witnesses who gave professional opinions, Dr. Ross and the County Sheriffs had no interest in the outcome of the litigation.

Finally, in adjudging the deterrent



effect of sobriety checkpoints, the Court returns to its earlier observations concerning the relevancy of the rate of arrests made in checkpoints. As found above, sobriety checkpoints cannot be expected to achieve any significant level of apprehending drunk drivers. This finding, in the Court's opinion, essentially undermines the whole theoretical basis for concluding that checkpoints can be effective in deterring drunk drivers, (i.e., that the public would fear being arrested for drunk driving if sobriety checkpoints were implemented, and thus, would not engage in drunk driving). Once the public perceives the truth about the low chance of a drunk driver actually being apprehended in a sobriety checkpoint, it cannot be reasonably supposed that those who are inclined to drink and drive will perceive a sobriety checkpoint as a significant threat

to their being arrested.

The Court, in determining whether sobriety checkpoints advance the public concern of curbing drunk driving, lastly examines the extent to which there is no practical alternative means available to the State to advance its interest other than by implementing sobriety checkpoints.

At trial, defendants sought to show this primarily through the introduction of data in the testimony of Lt. Downer, which indicated that while from 1958 to 1984, non alcohol related accidents had fallen from 2.8 per 100,000,000 miles of road traveled to 1.9; alcohol related accidents remained at approximately 1.1 per 100,000,000 miles of road traveled. Lt. Downer also noted that during this time period, however, the amount of drunk driving arrests had risen from approximately 17,000 statewide in 1968, to



over 71,000 in 1984. Defendants argued on the basis of this data that conventional methods of curbing drunk driving have not had a significant impact on the problem.

This Court does not find this argument persuasive. Even if there were no other evidence regarding the availability of alternative means of curbing drunk driving; the Court would note that this data does not suggest that sobriety checkpoints would be any more effective in reducing drunk driving. Such checkpoints were shown at best to have only a short term impact, and accordingly, this data does not demonstrate that checkpoints are the only practical alternative.[13]

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[13]Moreover, unexplained by Lt. Downer or defendants, is the possible impact on these figures that such things as an increase in the number of drivers, temporary lowering of the age for drinking, or increased number of law enforcement personnel all might have had in producing these statistics. These figures therefore, are not conclusive.

To the contrary, other evidence adduced at trial did convincingly demonstrate that conventional law enforcement methods, when utilized in conjunction with campaigns to increase the public awareness of the problem of drunk driving, were shown to be effective methods of curbing drunk driving.

As noted earlier, the data from the pilot study done in Maryland indicates that a county using only conventional law enforcement techniques was able to achieve reductions in drunk driving accidents at a rate similar or better than a county which implemented checkpoints. Moreover, Lt. Cotton noted that Baltimore County, one of Maryland's largest counties, had never had checkpoints. Yet, that county had consistently shown a drop in alcohol related accidents. The programs implemented by its sheriff were credited with this reduction.



Baltimore County, without the use of sobriety checkpoints, had furthermore won national awards for the results achieved by its law enforcement personnel in curbing drunk driving. The evidence from Maryland shows very strongly that effective alternative means of reducing the rate of drunk driving accidents do exist.

The Court further notes that Col. Hough testified as to certain special programs that the State Police had implemented, and that these programs had resulted in reducing alcohol related accidents. At the very least, his testimony indicates that the statistics given by Lt. Downer do not tell the whole story, and that other programs had, in fact, resulted in reducing drunk driving accidents or fatalities in Michigan.

Col. Hough's testimony was corroborated by the testimony of the Sheriffs of

Wayne, Macomb, and Kalamazoo Counties, all of whom testified that the intensive use of certain conventional law enforcement techniques had a positive effect in their counties.

The testimony of Col. Hough and the Sheriffs as to the existence of other alternative programs was corroborated by that of Dr. Ross. In his opinion the State had other options to sobriety checkpoints, such as administrative license revocation and stepped up prosecution and punishment of those arrested and convicted for drunk driving.

Dr. Ross's testimony as to the existence of other devices for curbing drunk driving, which may not have been implemented, is additionally borne out by the fact that of the 35 specific recommendations made by the Drunk Driving Task Force in 1984, Col. Hough testified that the only one which the State had attempted to implement was the one



regarding sobriety checkpoints. The Court is left to wonder why none of the other 34 recommendations were deemed worthy of implementation.

Based on the foregoing, the Court finds the data given by Lt. Downer as to the unavailability of alternative means unpersuasive. The evidence taken as whole, rather, indicates that while drunk driving remains a grave problem, other programs which rely on approved methods of law enforcement can, and do, in fact, have a positive effect in reducing drunk driving accidents and fatalities.[14]

In summary of the foregoing, the

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[14]The Court's conclusion is supported by the finding of alternative means in State v McLaughlin, supra, 471 NE2d at 1137; Webb v State, supra, 695 SW2d at 682. Also see, State v Deskins, supra, 673 P2d at 1187 (Prager, J., diss.).

Court finds that sobriety checkpoints are not an effective means to apprehend drunk drivers, that such checkpoints do not have any long term deterrent effect, and that there exists alternative means available to the defendants in their effort to curb drunk driving. Accordingly, the Court further finds that sobriety checkpoints, of the type which defendants' plan seeks to implement, do not significantly further the public interest in curbing drunk driving.

C. Intrusiveness of Sobriety checkpoints

The last factor to be examined under the Brown test is the severity of the intrusion on individual liberty which results from the seizure of persons in sobriety checkpoints. See, State v Muzik, supra, 379 NW2d at 603; Ingersoll v Palmer, supra, 221 Cal Rptr at 667. Under this factor, as



exemplified by the analysis found in Brignoni-Ponce; Martinez-Fuerte, and Prouse, the Court examines both the objective and subjective nature of the intrusion on individual liberty interests.

In the Martinez-Fuerte and Prouse cases, the objective nature of intrusion is measured, in general, by examining such factors as the duration of the seizure and the intensity of the police investigation which occurs during the seizure.

In measuring the objective quality of the instrusion in the case at bar, the Court notes that it was the consistent testimony of those police officers who had actually had some experience in operating checkpoints, that the average length of a stop when a person was confronted by a police officer at a checkpoint was approximately 30 seconds. Moreover, the Court notes that the

Guidelines indicate that the intensity of the investigation by the police during this 30 second time period was not great, inasmuch as the police were directed only to observe the driver for signs of intoxication.

The Court concludes from this evidence that the objective nature of the intrusion was minimal.

The Court next passes on to consider the subjective nature of the intrusion on individual liberty interests. In examining the subjective quality of the intrusion, under the analysis of Martinez-Fuerte, the Court is directed to make its findings on the basis of two factors: the degree of surprise and fright which could be engendered by the seizure; and the amount of discretion that an on-the-scene officer has in determining the location of the checkpoint and in determing whom shall be stopped. A final factor in



analyzing the subjective nature of the intrusion, as suggested in Prouse, and in Brown, is the extent to which checkpoints are consistent with traditionally protected liberty and privacy interests. Also see, State v Smith, supra, 674 P2d at 564-565; Webb v State, supra, 695 SW2d at 683.

Regarding the degree of surprise and fright which could be engendered by the seizure at the checkpoint, it is important to note that in Martinez-Fuerte the Court found the checkpoint under review did not generate surprise or fear, largely on the basis that the checkpoint in question, was a permanent one. The Court reasoned that because of the permanency of location, people would know or could learn of the checkpoint's location. Thus, there would be no surprise or fear in encountering the checkpoint, because people knew it would be at a given location. This,

of course, also meant the persons not wanting to go through the checkpoint could take alternate routes.

In subsequent cases upholding the constitutionality of temporary checkpoints, courts have found that such checkpoints do not create surprise or fear, notwithstanding their temporal nature, when the police give advance warning through the media of the general location of such checkpoints. The public is thereby alerted to the presence of such checkpoints in the vicinity and are less likely to be surprised or fearful in encountering such checkpoints. Ingersoll v Palmer, supra, 221 Cal Rptr at 669-670; People v Bartley, supra, 486 NE2d at 888; State v Superior Court, supra, 691 P2d at 1077; Little v State, supra, 479 A2d at 913. Additionally, when the public is accorded an opportunity to make U-turns or turn offs, and



thus avoid altogether the necessity of going through the checkpoint, this is seen as a further indicia that the checkpoint will not generate fear or surprise. Little v State, supra.

Another factor in determining the degree of surprise and fear that a particular checkpoint will induce is the purpose for which the police are stopping vehicles. In this regard, it may be presumed that a checkpoint instituted to enforce administrative requirements, would generate less fear then if the checkpoint was instituted to search for violators of criminal laws. State v Smith, supra, 674 P2d at 565.

In applying the foregoing to the case at bar, the Court notes the following relevant facts: The sobriety checkpoints, as conceded by all, will be transitory.

The Guidelines suggest that advance

warning to the general public be given by the police as to the county in which the checkpoints will be located. As indicated by Col. Hough this will be accomplished by giving press releases to the local news media. The Court notes, however, that the defendants have not indicated that the news media are required to publish this notice or to give the checkpoint any special attention. The Guidelines do not provide for alternative methods for alerting the public as to the location of checkpoints should the media refuse to cooperate or give only minimal attention to the news releases of defendants.

In a further effort to alert motorists of the location of the checkpoints, Lt. Fladseth indicated that there will be signs stationed approximately 1/4 mile from the checkpoint, which indicate that the motorist is entering a checkpoint.



The Court further notes that the Guidelines, at least in theory, contemplate that motorists will be able to turn around before entering into the checkpoint. Additionally, Lt. Slaughter indicated that a person could refuse to roll down his or her window. However, the Court notes that Col. Hough and Lt. Slaughter both stated that the public would not be informed that they could refuse to drive through the checkpoints, nor would the signs advertising the approach indicate these features.

Nor does the fact that the Guidelines contemplate that motorists could turn around or turn off, decrease the level of surprise or fright engendered in encountering checkpoints, since the voluntariness of motorist' participation is largely illusory, due to the failure of the defendants to make any provision to alert the public that

they did not have to go through a checkpoint, but rather could legitimately avoid it by turning off the road or by making a U-turn. Additionally, the voluntary nature of participation in going through checkpoints is also shown to be a fiction, since the defendants would not, in siting the checkpoints, insure that it was located where people could safely and legally make U-turns or turn-offs.

Finally, with respect to the amount of surprise or fear created by such roadblocks, there is no dispute that at least the publicly stated purpose of checkpoints and the actual activities of the police in operating checkpoints is to search for violators of criminal law. Thus, the potential for checkpoints in generating fear in motorists as they pass through is heightened.

In further considering the degree of subjective intrusion upon individual liberty



that sobriety checkpoints may have, the Court examines the amount of discretion left to on-the-scene officers. Lt. Slaughter testified that the personnel who would operate the checkpoints were given some training as to how to conduct themselves. During the course of the operation of the checkpoints, the Guidelines indicated that all vehicles were to be stopped. This was borne out by the testimony of Lt. Fladseth who testified that the police would be instructed to stop all vehicles. Col. Hough's testimony indicates that the discretion of individual officers' operation of checkpoints would be further diminished by the presence of a senior officer with the rank of lieutenant or above. However, on-the-scene officers were left to their own discretion as to whom they would pull over for further investigation. In this regard, the Guidelines, as well as the testi-

mony of Lt. Slaughter, indicates that the standards used by the on-the-scene officers for determining whether a particular person should be further detained due to evidence of intoxication, were those standards commonly used by police to stop vehicles in order to investigate for possible drunk driving.

Regarding the discretion of on-the-scene officers as to where to locate checkpoints, the Guidelines indicate that this decision is one made by supervisory personnel. Lt. Fladseth further testified that the decision as to where to site a checkpoint was based primarily on data retrieved from the Michigan Accident Location Index (MALI) system which indicated, where alcohol related accidents and fatalities were most severe, as well as the time of day when such accidents were most likely to occur. The Court, based on this evidence as it relates to the plan



involved in the case at bar, finds that there is no discretion to on-the-scene officers as to where checkpoints will be located, and that the location and time of implementing checkpoints will be determined by neutral criteria.

Accordingly, in further considering relevant factors in making a determination as to the subjective nature of the intrusive character of the checkpoints, the Court finds that the Guidelines established to implement the plan, will ensure that on-the-scene officers' discretion relative to the operation of sobriety checkpoints will be minimal.

Finally, in determining the degree to which these checkpoints subjectively intrude on a person's individual liberty, the Court looks to the degree to which sobriety checkpoints are consistent with traditionally protected liberty and privacy interests.

There is no doubt that under the Fourth Amendment, persons do have a reasonable, if somewhat diminished, expectation of privacy while travelling the roads in their automobiles. Delaware v Prouse, supra, 440 US at 662. This reasonable expectation of privacy has traditionally meant that there are limits on the power of the State to stop and seize motorists.

This has meant that the police must have at least an articulable suspicion of wrongdoing or some other approved basis, before they are permitted to stop vehicles for investigating purposes. As noted by the Court in Carroll v United States, supra, 267 US at 153-154:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary, because of national self-protection



> reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

In the case at bar, the law enforcement technique sought to be implemented under the defendants' plan, namely sobriety checkpoints, goes beyond the traditionally recognized reasons for stopping motorists in their cars. The implications of such a procedure being approved are grave indeed. Some of these are stated by the Court in State v Smith, supra, 674 P2d at 564-565.

> The Court finds such activities by law enforcement authorities, while commendable in their ultimate goal of removing DUI offenders from the public highways, draw dangerously close to what may be referred to as a police state. Here, the state agencies have ignored the presumption of innocence, assuming that criminal conduct must be occurring on the roads and highways, and have taken an 'end

justifies the means' approach. The Court is not so naive to think that criminal conduct does not occur regularly in the form of DUI offenders. Yet, a basic tenet of American jurisprudence is that the government cannot assume criminal conduct in effectuating a stop such as the one presented herein. Were the authorities allowed to maintain such activities as presented in this case, the next logical step would be to allow similar stops for searching out other types of criminal offenders. For example, it is well known to the public that shoplifting is an everyday occurrence which constantly plagues merchants in Oklahoma and elsewhere. Are law enforcement authorities then to be allowed to establish fixed checkpoints, permanent or otherwise, outside of every shopping center in the area to question all existing shoppers as to whether they possess sales receipts? Are law enforcement authorities to be allowed to demand all shoppers to produce such receipts or be subject to arrest every time they go shopping? The potential for abuse is apparent.

See also, Webb v State, supra, 695 SW2d at 683; State ex rel Ekstrom v Justice Court, supra, 663 F2d at 997 (Feldman J., conc.): State v Crom, supra, 383 NW2d at 469-470 (Krovosha, CJ., conc.).



Given the potential for abuse[15] that lies in approval of such procedures, the Court finds that sobriety checkpoints have a significant potential for intruding on traditionally protected liberty and privacy interests, and thus are not consistent with such interests.

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[15]This potential for abuse is not merely hypothetical. In the instant case the Court notes that the statute which authorizes the State Police to set up sobriety checkpoints also authorizes local police departments to set up their own checkpoints.

Given the inclination, local police forces could set up sobriety checkpoints on roads indentified by a system such as MALI as having a drunk driving problem. It is not inconceivable that several checkpoints could be set up along the same road which happened to run through several cities or townships. It is not inconceivable therefore that a motorist could encounter several checkpoints in a short period of time while driving through several municipalities. Certainly it must be concluded that such a system of checkpoints would be repugnant to traditional notions of individual liberty. See State v Deskins, supra, 673 P2d at 1158 (Praeger, J., diss.); United States v Carroll, supra.

Under the above findings, relative to the subjective intrusion on individual liberty interests, occasioned by sobriety checkpoints, the Court finds that the checkpoints sought to be implemented in this case do have the potential for generating significant degrees of surprise and fear in motorists passing through them. The Court also finds that the discretion of the police in operating such checkpoints and determining their location is severely limited. Added into this equation, however, is the further finding that such checkpoints are not truly consistent with traditionally protected liberty and privacy interests.

While it may be argued that the lack of discretion of the police officers does indicate that the subjective intrusion may not be great, on balance, when the Court takes into account its finding that such



checkpoints will generate surprise and fear, together with its finding that such checkpoints are inconsistent with traditionally protected individual liberty and privacy interests, the Court concludes that the latter two findings outweigh the former. The Court thereby finds that sobriety checkpoints of the type which are contemplated by defendants' plan do have a significant subjective intrusive impact on a person's liberty interest.

3. CONCLUSIONS OF LAW

In reviewing the foregoing findings of fact relative to applying the Brown test to the case at bar, the Court initially observes that given the warrantless nature of the seizures authorized by the Guidelines which would occur at sobriety checkpoints, the burden of establishing the lawfulness of the seizures under the Fourth Amendment falls

on the defendants. Commonwealth v McGeoghegan, supra, 449 NE2d at 353; State v McLaughlin, supra, 471 NE2d at 1136; Webb v State, supra, 695 SW2d at 681. Thus in applying the Brown test to the case at bar, the Court proceeds under the assumption that the defendants have the burden of showing that the seizures of persons at checkpoints would be reasonable, and thus satisfy the Fourth Amendment. Put another way, it is incumbent on defendants to show a) a legitimate state interest, b) that the checkpoints substantially furthered that interest; and c) that both the objective and subjective intrusion on an individual's liberty interest was minimal.

In so fixing defendants' burden of proof, the Court is mindful of the way the United States Supreme Court resolved the balancing test in Brignoni-Ponce,



Martinez-Fuerte and Prouse.

As recounted earlier, in Brignoni-Ponce the warrantless random stop of vehicles by the Border Patrol was held unconstitutional. Although the Court found a public interest, and that the procedure did further that interest, the Court found, in essence, that there was substantial subjective intrusion of individual liberty since there were no standards governing the exercise of the discretion of the Border Patrol's agents. In Prouse, the warrantless, random stop of a vehicle made by police to check the driver's license and vehicle registration was held unconstitutional because the procedure did not further the State interest and there were no limits on the exercise of police discretion notwithstanding a finding of state interests. By way of contrast in Martinez-Fuerte, the Court held constitu-

tional the warrantless stop of cars at check-points along major thoroughfares on the Mexican-American border, which were designed to check for illegal entry in this country, because the government was shown to have a substantial interest in preventing illeqal aliens from entering into this country, the procedure substantially furthered that interest and the objective and subjective intrusion were both deemed minimal. Thus in this trilogy of cases which exemplify the practical application of the test later synthesized in Brown, the warrantless stopping of cars by the police, who otherwise had no articulable suspicion of wrongdoing, was found to meet constitutional muster only where all three elements of the Brown test were shown to be present in the government's favor.

Applying these principles of law to



the facts found in the case at bar, the Court finds that the defendants have failed in their burden of proof. As noted above, the evidence indicates the State does have a keen interest in curbing drunk driving. Yet the evidence indicates that sobriety checkpoints have only a minimal degree of effectiveness in curbing drunk driving. In this regard the Court found that sobriety checkpoints can be used to effectuate only an extremely low number of arrests, and that they have no potential for a sustained deterrent effect. Morever, the evidence has been replete with examples of reasonable constitutionally approved alternative procedures, which could and did curb drunk driving. Finally, while the evidence showed that the objective intru-sion on individual liberty interests was minimal, the Court found the evidence showed that the subjective intrusion on individual

liberty interests which would be caused by the sobriety checkpoints was substantial.[16]

Accordingly, the Court concludes that application of the Brown test to the case at bar results in a finding that the sobriety checkpoints contemplated under the Guidelines of defendants is violative of the Fourth Amendment as applied to the States through the Fourteenth Amendment.

C. Sobriety Checkpoints are per se unreasonable, and thus unconstitutional under the Michigan Constitution.

While the foregoing discussion and resolution of plaintiffs' challenge to defendants' plan under the Fourth Amendment would

[16]It is precisely because this Court finds, based on the factual record before it, that the second and third elements of the Brown test have not been satisfied that the Court finds uncontrolling the appellate authority from other states referred to earlier that have found sobriety checkpoints constitutional.



appear to be dispositive, the Court recognizes that plaintiffs challenged the plan under Michigan Const 1963, Art 1, § 11. In order to render a complete decision on all of the issues raised herein, the Court will proceed to pass on the merits of plaintiffs' claim under the Michigan Constitution.

Initially, the Court notes that defendants asserted that this Court's analysis of the case under the Michigan Constitution be no different from that of our analysis of the case under the Fourth Amendment. The basis of their assertion is that our State Constitution provides no greater protection than does the Federal Constitution. In support of their contention that the two constitutions be read to provide identical protection, they rely on People v Smith, 420 Mich 1 (1984).

In People v Smith, supra, 26-28, the Court held that the test to determine a per-

son's standing to contest a search or seizure under the Mich Const. 1963, Art 1, § 11, was the same test used to determine standing under the U.S. Const. Am IV. Yet in doing so, the Court specifically acknowledged that "in the past we have on occasion offered defendants greater protection under Art 1, § 11, than the Supreme Court of the United States has offered under the Fourth Amendment." Id., 420 Mich at 19. Thus the defendants' contention that this Court must adhere to the construction given the Federal Constitution by the United States Supreme Court in construing the Michigan Constitution is simply not accurate.[17] Accordingly, the

[17]It should be noted that People v Chapman, ___ Mich ___ Docket #75751, Decided June 6, 1986, involving the suppression of certain evidence is not controlling. The case at bar does not involve the suppression of any evidence.



Court approaches also the constitutionality of sobriety checkpoints through a separate consideration of Michigan precedent construing Mich Const 1963, Art 1, § 11. This provision provides in relevant part:

> "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, support by oath or affirmation."

Initially it is important to note that all agree that the stopping of motor vehicles at a sobriety checkpoint is a seizure within the meaning of both constitutions. Therefore Art 1, § 11's proscription against unreasonable searches and seizures is involved.

Most recently our Supreme Court in Tallman v Department of Natural Resources, 421 Mich 585, 598-599 (1984) stated the tra-

ditional general rule as to when a search is unreasonable under Art 1 § 11 as follows:

> "A warrantless search is unreasonable per se and violates the Michigan Constitution unless shown to be within an exception to this rule . . . This Court has sanctioned warrantless searches by law enforcement officers who have probable cause to believe that a violation of the law has occurred when exigent circumstances make obtaining a warrant unfeasible." (citation to authorities omitted).

This rule is reflected in the Court's treatment of searches and seizures of persons in automobiles as summarized in People ex rel Attorney General v Lansing Municipal Judge, 327 Mich 410, 424-425 (1950) (a case decided exclusively under the Michigan Constitution):

> Likewise, in Carroll v United States, supra, it was said that persons entitled to use the highways have a right to free passage without interruption or search except upon probable cause for believing the law to be violated. Furthermore, the mere refusal of a person to submit to search is not such a fact as gives rise to probable cause to believe that an offense is being committed entitling the officer to proceed with the search. State v Gibbs, 252 Wis 227 (31 NW2d 143). Neither may an officer make a search on



> the basis of mere suspicion without probable cause to believe that the law is being violated. See People v Stein, 265 Mich 610 (92 ALR 481), and People v Roache, supra, in which this Court held that an officer may not stop automobiles upon public highways promiscuously and demand the showing the drivers' licenses as a subterfuge for the purpose of invading the travelers' constitutional rights and then searching the automobiles for liquor.

While it may be that since Lansing Municipal Judge was decided, further developments in stare decisis would hold that a police officer could make an initial investigation stop of a motor vehicle upon the articulable reasonable suspicion that a law was being violated, see, People v Lillis, 64 Mich App 64, 70 (1975) (and cases cited therein), People v Bloyd, 96 Mich App 264, 267 (1980), aff'd 416 Mich 538 (1982) (and cases cited therein), nonetheless, the Court is aware of no Michigan authority construing the Michigan Constitution, nor do defendants cite to any,

which would authorize or even suggest approval for the seizure of motorists absent at least an individualized articulable suspicion that some criminal wrongdoing had or was about to occur. Yet this is precisely what defendants' plan allows the police to do; namely, it contemplates the seizures of motorists without any showing of an individualized articulable suspicion that the particular motorist was involved or was about to become involved in some criminal activity. The plan thus falls below that minimal level of what the police must presently have in order to stop and seize motorists.

The defendants having failed to show that their plan falls within any of the exceptions to the warrant requirement of Mich Const 1963, Art 1, § 11, the Court finds the seizures contemplated under the plan per se unreasonable, and hence violative of Mich



Const 1963, Art 1, § 11.[18]

IV. CONCLUSION

In summary of the above findings, the Court finds that the Guidelines to implement sobriety checkpoints which were drafted by defendants do not run afoul of the requirements of the Michigan Administrative Procedures Act; and that there is statutory authority for the operation of sobriety checkpoints. Therefore, no relief can be granted under these claims. However, the Court further finds that defendants' plan to

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[18]It should be noted that this Court's conclusion is supported by the reasoning and result reached in Commonwealth v Tarbert, ___ Pa supra ___; 502 A2d 221 (1985) (holding sobriety checkpoints per se unconstitutional under the Pennsylvania Constitution). As in Tarbert, the above decision rendered by the Court finding the sobriety checkpoint plan unconstitutional under Mich Const. 1963, Art 1, § 11, thus rests on "bona fide, separate, adequate, and independent [state] grounds ..." See, Michigan v Long, 463 US 1032, 1041; 103 S Ct 3469; 77 L Ed 2d 1201 (1983).

conduct sobriety checkpoints is violative of the Fourth Amendments of the United States Constitution and Article One, Section Eleven of the Michigan Constitution.

Accordingly, it further follows that plaintiffs are entitled to the issuance of a permanent injunction enjoining the defendants from implementing their plan to conduct sobriety checkpoints.

MICHAEL L. STACEY, Judge
Third Judicial Circuit of
Michigan

DATED: 24 JULY, 1986

DETROIT, MICHIGAN.

MLS:jg



MICHIGAN STATE POLICE

SOBRIETY CHECKPOINT GUIDELINES

Traffic Services Division

May 1986

## ACKNOWLEDGEMENTS

These guidelines were first developed by Sergeant Mark DeHaan, Michigan State Police, Traffic Services Division, in anticipation of the department becoming involved in a statewide, alcohol sobriety checkpoint program in Michigan.

In February 1986, Colonel Gerald L. Hough appointed a Sobriety Checkpoint Advisory Committee composed of representatives of the state police, local law enforcement, prosecuting attorney, and the University of Michigan Transportation Research Institute. Their charge was as follows.

> The purpose of the Sobriety Checkpoint Advisory Committee is to work with state police staff in reviewing proposed guidelines, possible checkpoint locations, and operation plans and to make recommendations to the Director regarding program implementation. This program is considered a joint effort between local and state law enforcement, and the thoughts and ideas of each member are solicited so as to enhance the overall success of the program.

Sobriety Checkpoint Advisory Committee Members:

Colonel Gerald L. Hough, Chairman

Inspector LeRoy Fladseth, Michigan State Police, Traffic Services Division

Sheriff Allan Davis, Ingham County Sheriff Department



Chief Neal Agachinsky, Flint Township Police Department, representing the Michigan Association of Chiefs of Police

Chief Robert Foster, East Lansing Police Department

Chief John Amthor, Meridian Township Police Department

Mr. Kim Warren Eddie, Ingham County Prosecutor's Office

Lieutenant William Slaughter, Michigan State Police, Traffic Services Division

Sheriff Tom Edmonds, Kalamazoo County Sheriff, representing the Michigan Sheriffs Association

Captain Edward Lenon, Michigan State Police, First District Headquarters

Mr. Sheridan Rhoads, Office of Highway Safety Planning

Mr. Lyle Filkins, University of Michigan Transportation Research Institute

Associate Members:

Captain Kenneth Casperson, Michigan State Police, Traffic Services Division

Captain Richard Abbott, Ingham County Sheriff Department

Sergeant William Shelton, Meridian Township Police Department

Lieutenant Gary Howell, East Lansing Police Department

First Lieutenant Richard Jarman, Michigan State Police, Lansing Post

Mr. Ted Stopczynski, Michigan State Police, Executive Division

Professional Staff:

Mr. Robert Ebersole, Ingham County Prosecutor's Office

Lieutenant Wesley Hubers, Michigan State Police, Traffic Services Division

First Lieutenant Hugh Thomas, Michigan State Police, Traffic Services Division

Sergeant John Shotwell, Michigan State Police, Traffic Services Division

Sergeant Marshall Weeks, Michigan State Police, Traffic Services Division

These guidelines are the result of careful research and consultation with members of the above Sobriety Checkpoint Advisory Committee and law enforcement agencies of other states where success has been experienced. Special appreciation is extended to the members of the Maryland State Police for their help and unselfish willingness to share information. Much of the Maryland State Police checkpoint program, with specific attention given to the rights of the individual, has been incorporated in these guidelines.



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[Note: Because of difficulty in complying with this Court's printing requirements, the appendices, consisting of diagrams and a list, have been omitted.]



## IMPLEMENTATION OF SOBRIETY CHECKPOINT PILOT PROGRAM IN MICHIGAN

### I. PURPOSE

The purposes of these Guidelines are:

A. To provide background information that demonstrates the need for additional efforts directed to reduction of alcohol-related crashes in Michigan.

B. To provide policy and procedural guidelines by which a pilot program for sobriety checkpoints is to be operated in Michigan.

C. To provide checklists of recommended equipment for conducting sobriety checkpoints.

### II. BACKGROUND INFORMATION

Over the last several years, victims of alcohol-involved accidents and other anti-

drunk driving activities have promoted legislative and program initiatives in many states to curb drunk driving. Yet, in spite of this increase in legislative and countermeasure activity, drunk driving remains a serious problem and is one of our nation's most serious public health, transportation, and safety issues. Michigan 1984 alcohol-related traffic crash statistics reveal that 800 persons died, 28,681 suffered personal injury, with a total economic cost of $351,959,000. Therefore, if drunk driving is to be reduced significantly through law enforcement efforts, motorists must be persuaded that if they drive while intoxicated, there is a strong likelihood they will be arrested and face the ensuing consequences. Authorities agree that many drunk drivers persist in their behavior



because of a perceived low risk of arrest. While the rate of drunk driving arrests may depend largely upon the aggressiveness of law enforcement efforts, estimates of the probability of arrests vary from one in two hundred drunk drivers to one in two thousand.

The impact of increased enforcement efforts to curb the drunk driver is frequently blunted by lengthy court backlogs, particularly as the judicial system struggles to impose recently enacted tougher sanctions. While no single program will produce a solution to the complex problem of driving while intoxicated, sobriety checkpoints have the potential to produce a major change in the deterrence climate in this state.

Sobriety checkpoints have been used successfully in numerous states and have the

potential of enhancing Michigan's OUIL enforcement efforts by presenting both a real and perceived risk of being apprehended for drunk driving. Since every driver is potentially subject to being stopped, sobriety checkpoints are believed to have a high deterrent effect in that they preclude drunk drivers from assuming they can avoid police detection by simply driving "cautiously."

One of the first questions to be raised about sobriety checkpoints is that of constitutional authority. On March 24, 1986, the U. S. Supreme Court refused to hear arguments that challenged the Virginia Sobriety Checkpoint Program on grounds that it constituted an unreasonable search and seizure. Numerous state courts have also ruled that sobriety



checkpoints are legal as drunk driving countermeasures. Where there has been an adverse court decision, the decision was based on some procedure held to be improper which, when corrected, made the sobriety checkpoint program perfectly legal. It is most imperative that sobriety checkpoints in Michigan be conducted in the utmost professional manner with predetermined goals and objectives. In this pilot sobriety checkpoint proposal, specific measures have been taken to avoid abuses and errors and ensure constitutional guarantees.

In Michigan, the statutory authority to operate such checkpoints is contained in the Michigan Vehicle Code, Act No. 300, P.A. 1949, as amended, Section 257.715(2). However, it has been argued by many that

checkpoints could be legally operated even without such authority. The Michigan Drunk Driving Task Force, in concert with the 1983 report of the President's Commission on Drunk Driving, has recommended that the Michigan Office of Highway Safety Planning, the University of Michigan Transportation Research Institute, and the Michigan Department of State Police develop a pilot program to test the effectiveness of sobriety checkpoints. An overview of that pilot program follows.

## III. OVERVIEW

Sobriety checkpoints are intended to impact the drunk driving problem by increasing the perception that the drunk driver will be detected and arrested.



Sobriety checkpoints will be conducted at times and in places where alcohol and drug use has caused traffic danger. Every vehicle passing through the checkpoint will be stopped. A police officer will make a quick determination of the driver's condition. Motorists who are sober will be passed through quickly, while those who exhibit symptoms of intoxication or drug use will be detained for additional screening.

An integral aspect of the pilot program will be to publicize the deployment of sobriety checkpoints to attain maximum public awareness and voluntary compliance with OUIL laws. This increased awareness will be reinforced by implementation of the checkpoints.

Another aspect of the program design is to inform the motorist and monitor the

public's reaction to sobriety checkpoints. A driver's survey card and brochure will be distributed to all drivers passing through the checkpoint. The survey card will be a detachable pre-addressed questionnaire covering drivers' reactions to the checkpoint. In addition, an informational brochure will be distributed which explains the purpose of the sobriety checkpoint program and provides helpful information regarding the effects of alcohol at various consumption levels.

IV. GOALS

-- Deter drunk driving, thereby reducing the death, injury, and property damage caused by alcohol- and drug-related traffic accidents.

-- Conduct checkpoints with a minimal amount of intrusion or motorist inconvenience.



-- Assure the safety of the general public as well as law enforcement officers involved.

V. OBJECTIVES

-- Increase the perception of "risk of apprehension" in the minds of those drivers who would operate a vehicle while under the influence of alcohol or controlled substances.

-- Ensure that the constitutionally guaranteed rights of individuals are protected.

-- Remove intoxicated drivers from the public highways.

VI. SITE SELECTION

The criteria and data used to determine each site selection will be recorded and maintained.

A. General Site Locations

1. Sobriety checkpoints shall be conducted at selected locations to monitor traffic for driver sobriety. These locations shall be based upon criteria, as approved by the Director of the Department of State Police, which consider the previous alcohol and drug experience per time of day and day of week as identified by arrests and/or Michigan Accident Location Index data.

2. The selection of target highways within the state will be chosen with consideration given to the following.

   a. Alcohol-involved accident experience.



   b. Prosecution interest and statutory potential.

   c. Local law enforcement cooperation.

   d. Law enforcement resource availability.

B. Specific Site Selection

The choice of specific checkpoint sites within the target highways shall be based on the following.

1. Safety of the location for citizens and law enforcement personnel. The site selected shall have a safe area for stopping a driver and must afford oncoming traffic sufficient sight distance for the driver to safely come to a stop upon approaching the checkpoint.

2. The location must ensure minimum inconvenience for the driver and facilitate the safe stopping of traffic in one direction during the pilot program.

3. Roadway choice must ensure that sufficient adjoining space is available to pull the vehicle off the traveled portion of the roadway for further inquiry if necessary.

4. Consideration should be given to the physical space requirements as shown in Appendixes "A" and "B."

VII. OPERATION

A. Briefing and Debriefing

Uniform officers at checkpoint locations are to be given instruction



regarding the procedure to be followed. This shall consist of a briefing to be conducted at a predetermined location and time. At the briefing, the officers will be instructed as to the exact location of the sobriety checkpoint, legal considerations involved, the procedure to be followed in approaching a vehicle, the initial contact with its driver, and what to do in specific situations.

A debriefing shall be conducted immediately following the checkpoint operation. The purpose is to provide an immediate critique of the operation and receive constructive comment from those involved.

B. Scheduling

1. During the pilot program the sobriety checkpoint will be maintained at a given location for a time period consistent with the activity experienced.

2. Although the exact time and location of sobriety checkpoints will not be made public in advance, their use will be widely publicized to enhance the desired deterrent effect among potential drunk drivers.

C. Safety Considerations

1. Each site will be staffed by a sufficient number of uniformed police officers to maintain a safe and efficient operation.

2. Appropriate reflectorized safety equipment shall be provided and uti-



lized by all personnel. This may include flares and/or reflectors to illuminate the site and aid in traffic direction. Warning signs, flares, cones, and/or emergency lighting equipment will be utilized and conspicuously displayed to provide advance notice of the impending stop.

3. It is imperative that communication is available to all involved during checkpoint operations. This is to be accomplished through the use of walkie-talkie radios assigned to checkpoint personnel.

4. Officers on point should use a flashlight with orange cone attached to direct traffic movement.

D. Equipment

For the purpose of the pilot program, Appendix "C" contains a list of equipment representative of that needed to establish a sobriety checkpoint.

E. Motorist Contact

1. All traffic passing through the checkpoint site shall be stopped. An officer will approach each driver and identify him or herself by title and department. The officer will advise each driver contacted that he/she is at a sobriety checkpoint intended to identify drunk and/or drugged drivers. If there is no evidence of intoxication, the officer will hand the driver a brochure explaining the program, as



well as a mail-back survey card, and direct the motorist on his/her way.

2. During the brief stop and contact with the driver, the officers will be alert for articulable indications of intoxication. These may include an odor of intoxicants about the driver, slurred speech, lack of physical coordination, unusual eye movements, disorientation, or other behavior commonly associated with OUIL or OUID.

3. Should indications of intoxication be present, the driver will be directed to move to an out-of-traffic location and then asked for his/her operator's license and vehicle documents.

4. The driver may then be requested to perform field sobriety tests and may be asked to take a pre-arrest breath test. If sufficient evidence of intoxication is present, the driver will be arrested; if insufficient symptoms of intoxication exist, the driver will be released.

5. If a driver approaching a sobriety checkpoint deliberately avoids the checkpoint process by either turning around or turning off the highway, the decision to pursue will be based upon the observed driving behavior. If it appears from the driving behavior that the driver may possibly be intoxicated, a decision to follow may be authorized by checkpoint command personnel.



F. Staffing

The sobriety checkpoint operation should consist of the following identified positions with their respective duties and responsibilities.

1. Command Personnel

A state police commissioned officer of Lieutenant rank or higher shall be the officer in charge at the sobriety checkpoint location. An assistant position is optional and may be assigned as needed. Responsibility shall include direct overall supervision of the officers assigned to the checkpoint and the proper operation of all activities in accordance with departmental approved policies, procedures, and guidelines.

If, at any time during the operation of the checkpoint, traffic congestion or other circumstances arise that warrant the discontinuing of the operation, the state police commissioned officer at his/her discretion may close down the operation for any length of time necessary.

2. Approach Safety Officer

This officer with a vehicle will be stationed along the shoulder of the highway in the approach to the checkpoint. Responsibility includes observing vehicles in their approach to the checkpoint and providing advance warning to officers at the checkpoint site of any potentially hazardous activities, such as an obvious drunk or reckless driver



coming into the checkpoint location. This officer shall not leave his/her position as long as the checkpoint is in operation.

3. Observation Officer

Officers with vehicles, assigned at both ends of the checkpoint, observe traffic entering and leaving the checkpoint. These positions are responsible to being alert for vehicles which may avoid the checkpoint and determining if their driving behavior exhibits that of a potential intoxicated driver. They would only pursue after reporting their observations to the command officer and receiving permission to follow.

If the driver of the observation vehicle leaves his/her site, an officer in reserve may replace him/her at that site if replacements are available.

4. Data Collection Officer

This officer is responsible for keeping an accurate activity record of those vehicles and activities required by departmental authority.

5. Lane Safety Officer

This officer is responsible for ensuring that all fusees are kept burning during the checkpoint operation and all cones remain in place. In addition, remaining alert for any other safety hazards in the lanes themselves shall be an included responsibility.



Fusees should be used only at the approach to the checkpoint and not within the actual checkpoint area. A metal container shall be used for expended fusees.

6. Checkpoint Contact Officer

These positions shall be stationed at the checkpoint location at predetermined distances apart. It shall be their responsibility to make contact with the respective motorists and make a determination of intoxication.

Officers will be assembled in the roadway to check motorists for articulable signs of intoxication. These officers will wear department-issued reflectorized vests and uti-

lize orange cones attached to their flashlights for traffic direction and control.

All traffic entering the checkpoint will be stopped. A uniformed police officer will approach the motorist and state, "I am Trooper (Officer) _____ of the Michigan State Police (local police department). You have entered a sobriety checkpoint set up to identify intoxicated drivers." If there is no immediate evidence of intoxication, a traffic safety informational brochure and survey card will be given to the motorist.

During the brief stop, the officer will look for articulable signs of intoxication such as an odor of



alcohol about the driver, slurred speech, and other behavior normally associated with OUIL or OUID violators. If the officer observes symptoms of intoxication, the driver will be directed to a predetermined "safe area" for further investigation. If the situation warrants, the driver will be asked to submit to a preliminary breath test; and if sufficient evidence of intoxication is observed, the driver will be arrested.

The checkpoint officer shall remain with the driver from initial contact to the arrest or release. When the officer leaves the lane, he/she is to be replaced by another officer, if available.

7. Support Personnel

Additional personnel may be assigned as replacement or support officers for any of the above positions, or for other duties which may be identified as necessary in the conduct of a safe and efficient sobriety checkpoint operation.



## STATE COURT APPELLATE DECISIONS CONCERNING ROADSIDE SOBRIETY CHECKPOINTS

| State | Const. | Case Name and Citation |
|---|---|---|
| Alabama | | |
| Alaska | | |
| Arizona | Yes | State v Superior Court, 691 P.2d 1073 (1984) |
| Arkansas | Yes | Coffman v State, 759 SW2d 573 (1988) |
| California | Yes | Ingersol v Palmer, 175 Cal App 1028; In Re Richard T, 185 Cal App 3d 855 (1986) cert den Richard T v California, ___US___(1988) |
| Colorado | | |
| Connecticut | | |
| Delaware | | |
| Florida | Yes | State v Jones, 483 So.2d 433 (1986) |
| Georgia | Yes | State v Golden, 318 S.E.2d 693 (GA. App. 1984) |
| Hawaii | | |
| Idaho | | |
| Illinois | Yes | People v Bartley, 486 N.E.2d 880 (1985) |

| | | |
|---|---|---|
| Indiana | Yes | State v Garcia, 481 N.E.2d 148 (Ind. App. 1 Dist. 1985) |
| Iowa | Yes | State v Riley, 377 N.W.2d 242 (1985) |
| Kansas | Yes | State v Deskins, 673 P.2d 1174 (1983) |
| Kentucky | Yes | Kinslow v Commonwealth, 660 S.W.2d 677 (Ky App, 1983), cert den Kinslow v Kentucky, 465 US 1105 (1984) |
| Louisiana | Yes | City of Baton Rouge v Dyson, 536 So.2d 1297 (1988) |
| Maine | Yes | State v Leighton, 551 A2d 116 (1988) |
| Maryland | Yes | Little v State, 479 A.2d 903 (1984) |
| Massachusetts | Yes | Commonwealth v Trumble, 483 N.E.2d 1102 (1985) |
| Michigan | No | Sitz v State Police, 170 Mich App 433 (1988) |
| Minnesota | No | State v Muzik, 379 N.W.2d 599 (1985) |
| Mississippi | Yes | Miller v State, 373 So.2d 1004 (1979) |
| Missouri | | |
| Montana | | |



| | | |
|---|---|---|
| Nebraska | possible under prescribed conditions | State v Crom, 383 N.W.2d 461 (1986) |
| Nevada | | |
| New Hampshire | No | State v Koppel, 499 A.2d 977 (1985) |
| New Jersey | Yes | State v Egan, 516 A.2d 1115 (1986) |
| New Mexico | Yes | City of Las Cruces v Betancourt, 735 P.2d 1161 (1987) |
| New York | Yes | People v Scott, 473 N.E.2d 1 (1984) |
| North Carolina | | |
| North Dakota | | |
| Ohio | | |
| Oklahoma | No | State v Smith, 674 P.2d 562 (1984) |
| Oregon | Yes | State v Shankle, 647 P.2d 959 (1982) |
| Pennsylvania | No based on state const | Commonwealth v Tarbert, 502 A.2d 221 (Pa. Super 1985) |
| Rhode Island | | |
| South Carolina | | |
| South Dakota | No | State v Olgaad, 248 N.W.2d 392 (1976) |

| | | |
|---|---|---|
| Tennessee | | |
| Texas | No | Webb v State, 695 S.W.2d 676 (1985) |
| Utah | | |
| Vermont | Yes | State v Martin, 496 A.2d 442 (1985) |
| Virginia | Yes | Lowe v Commonwealth, 337 S.E.2d 273 (1985) cert den Lowe v Virginia, 475 US 1084 (1986) |
| Washington | Yes | Fury v City of Seattle, 730 P.2d 62 (1986) |
| West Virginia | | |
| Wisconsin | | |
| Wyoming | | |